SUPREME COURT OF THE UNITED STATES.

No. 290.

SAMUEL H. RANDALL, PLAINTIFF IN ERROR,

VS.

LINCOLN F. BRIGHAM.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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1 UNITED STATES, *ss:*

The President of the United States to the judges of the Circuit Court holden in and for the district of Massachusetts, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between Samuel H. Randall, of the city, county, and State of New York, and a citizen of said State of New York, gentleman, plaintiff, and Lincoln F. Brigham, of Boston in the county of Suffolk and State of Massachusetts, a citizen of said State of Massachusetts, esquire, defendant, in a plea of trespass on the case, a manifest error has intervend to the great damage of the said Samuel H. Randall, as in his complaint has been stated. And as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that, if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and the Associate Justices of the Supreme Court of the United States on the first Monday of December next, at Washington, being the present seat of the National Government that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Salmon P. Chase, esquire, Chief Justice of the said Supreme Court, at Washington aforesaid, this twenty-fifth day of October, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-second.

JOHN G. STETSON, *Clerk.*

Allowed by

NATHAN CLIFFORD,
Ass. Jus. Sup. Court, U. S.

2 UNITED STATES OF AMERICA,
Circuit Court of the United States, Massachusetts District, ss:

And now, here the judges of the Circuit Court of the United States for the said district, make return of this writ by annexing hereto, and sending herewith, under the seal of the said Circuit Court, a true and attested copy of the record and process in the suit within mentioned, and of all proceedings therein.

In testimony whereof I, John G. Stetson, clerk of said Circuit Court of the United States within and for the district of Massachusetts, have hereunto set my hand and the seal of said court this fourth day of November, A. D. 1867.

[SEAL.] JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, *District Massachusetts ss:*

At a Circuit Court of the United States for the first circuit, began and holden at Boston, within and for the district of Massachu-

setts on Tuesday the fifteenth day of October, in the year of our Lord one thousand eight hundred and sixty-seven, before the Honorable Nathan Clifford, associate justice, and the Honorable John Lowell, district judge.

Plea of trespass.

SAMUEL H. RANDALL, plaintiff,
vs.
LINCOLN F. BRIGHAM, defendant.

In a plea of trespass on the case, for that whereas the said plaintiff, at Boston, in the county of Suffolk and commonwealth of
4 Massachusetts, before and at the time of the committing of grievances hereinafter complained of, was in the lawful possession of the office of an attorney and counsellor-at-law, with the right and privilege at all times freely to enjoy said office, by practicing as an attorney and counsellor-at-law, in any of the courts of said commonwealth, by means whereof the plaintiff was enabled to earn and did earn, divers profits and emoluments, to the amount of about three thousand dollars per annum, yet the said defendant, well knowing the premises, but contriving, and wrongfully and unjustly intending, to injure and disturb the said plaintiff, and to deprive him of the right and privilege, use, benefit, and profit of his said office, whilst the plaintiff was so possessed of, and so in the enjoyment of, the same, to wit, on the tenth day of October, A. D. eighteen hundred and sixty-four, unlawfully and without the leave or license, and against the will of the said plaintiff, entered or caused, procured, and directed to be entered, upon the docket and records of the Superior Court, within and for said county of Suffolk, holden at Boston, at the October term thereof, for criminal business, an order removing the plaintiff from the office of an attorney-at-law, within said commonwealth, and thereby greatly disturbed the said plaintiff in the enjoy-
5 ment of his said office, and prevented him from having the use and benefit thereof in so full and ample a manner as he otherwise might and would and ought to have done, and was lawfully entitled to do; and thereby, during all that time and from thenceforward and thereafter to the day of the purchase of this writ, continued, hindered, and prevented the said plaintiff from enjoying said office, and from practicing in and exercising his rights of attorney and counsellor-at-law in any of the courts aforesaid, for the purposes aforesaid; and whereby the said plaintiff could not, during the time aforesaid, have or enjoy the use of said office in so ample and beneficial a manner as he otherwise might and ought to do, and would have done, and hath been greatly disturbed and molested in the use and enjoyment thereof, as aforesaid. Wherefore the said plaintiff says, that by reason of the unlawful, wrongful, and unjust acts of said defendant, the plaintiff has been deprived of divers profits and emoluments, and hath lost divers sums of money, which would otherwise have arisen and accrued to him from the enjoy of his said office, and from the management, conduct, and practice as an

attorney-at-law in causes and legal proceedings in the courts of said commonwealth; and also his right and title to his said office imperiled and denied to his great loss and damage; and hath also
6 been put to great expense and the incurring of liabilities, in the employment of counsel to conduct and manage causes and suits in said courts, brought by the plaintiff, and wherein the plaintiff could have saved to himself the amounts so paid, and which liabilities incurred could have been saved to and avoided by the plaintiff had he been suffered to enjoy his office and exercise his rights as aforesaid; and hath also sustained considerable expense in the employment of counsel to obtain the annulling of said order of removal so made by defendant, and in efforts to protect and defend his right and title to his said office, and to secure the re-enjoyment of the same; and hath also been put to expense in the costs of certain proceedings had in the Supreme Judicial Court for said commonwealth for the securing and protection of his right and title to his said office: and hath also been put to and sustained great loss of time and trouble in endeavors to obtain the re-enjoyment of his lawful rights, and in defending his title to his office as aforesaid; and hath also, in divers other ways, sustained expense and serious damage by reason of defendant's unlawful and wrongful acts, as aforesaid. Wherefore the plaintiff says, that he is injured, and hath sustained damage, to the amount
7 of seven thousand dollars, and therefore he brings this suit to recover the same.

Second count.

For that, whereas the said plaintiff, at Boston, in the county of Suffolk, and Commonwealth of Massachusetts, before and at the time of the committing of the grievances herein complained of, was in the lawful possession of the office of an attorney-at-law, with the right and privilege at all times freely to enjoy said office by practising as an attorney-at-law in any of the courts of the commonwealth, by means whereof the plaintiff was enabled to earn, and did earn, divers profits and emoluments, yet the said defendant, being one of the justices of the Superior Court within and for the county of Suffolk aforesaid, well knowing the premises, but contriving, and wrongfully and unjustly intending, to injure and disturb the said plaintiff, and to deprive him of the right and privilege, use, benefit, and profit of his said office, whilst the plaintiff was so possessed, and so in the enjoyment of the same, to wit, in the month of October, A. D. one thousand eight hundred and sixty-four, unlawfully, and without the leave or license, and against the will and objection of the said plaintiff, and contrary to, and in violation of, said defendant's duty as a magistrate aforesaid, and of the legal rights of said plaintiff, which said defendant, as magistrate, was particularly bound to
8 respect, under and by color of his said office of magistrate aforesaid, but without any lawful authority or jurisdiction whatsoever in the premises, and wantonly, arbitrarily, and oppressively removed said plaintiff from his office of attorney-at-law, as

aforesaid, and entered, or caused, procured, and directed to be entered, upon the docket and records of the Superior Court, within and for said county of Suffolk, holden at Boston, at the October term thereof, for criminal business, an order removing the plaintiff from the office of an attorney-at-law within said commonwealth, and thereby greatly disturbed the said plaintiff in the enjoyment of his said office, and prevented him from having the use and benefit thereof in so full and ample a manner as he otherwise might, and would, and ought to have done, and was lawfully entitled to do; and thereby, during all that time, and from thenceforward and thereafter, to the day of the purchase of this writ, continued, hindered, and prevented the said plaintiff from enjoying said office and from practising in and exercising his rights as attorney-at-law in any of the courts aforesaid, for the purposes aforesaid, and whereby the said plaintiff could not, during the time aforesaid, have or enjoy the use of said office in so ample and beneficial a manner as he otherwise
9 might and ought to do, and would have done, and hath been greatly disturbed and molested in the use and enjoyment thereof, as aforesaid. Wherefore, the said plaintiff says, that by reason of the unlawful, wrongful, unjust, and oppressive acts of said defendant, the said plaintiff has been deprived of divers profits and emoluments, and hath lost divers sums of money which would otherwise have arisen and accrued to him from the peaceful enjoyment of his said office, and from the management, conduct, and practice as an attorney-at-law in causes and legal proceedings in the courts of said commonwealth, and also his right and title to his said office impaired and denied, to his great loss and damage; and hath also been put to great expense, and the incurring of liabilities in the employment of counsel to conduct and manage causes and suits in said courts, brought by the plaintiff, and wherein the plaintiff could have saved himself the amounts so paid, and which liabilities incurred could have been saved to, and avoided by, the plaintiff, had he been suffered to enjoy his office and exercise his rights, as aforesaid; and hath also sustained considerable expense in the employment of counsel to obtain the annulling of said order of removal so made
10 by defendant, as aforesaid, and in efforts to protect and defend his right and title to his said office, and to secure a re-enjoyment of the same; and hath also been put to expenses in the costs of certain proceedings had in the Supreme Judicial Court for said commonwealth, for the securing and protection of his right and title to his said office; and hath also been put to, and sustained great loss of, time, and suffered great trouble in endeavors to obtain the re-enjoyment of his lawful rights, as aforesaid, and in defending his title to his said office of attorney-at-law; and hath also, in divers other ways, sustained expense and serious damage by reason of defendant's unlawful and wrongful acts, as aforesaid.

Wherefore, the said plaintiff says that he is injured and hath sustained damage to the amount of seven thousand dollars, and therefore he brings this suit to recover the same.

To the damage of the said plaintiff, as he says, the sum of seven thousand dollars.

The writ in this case is dated the twenty-sixth day of April, A. D. 1866, and was duly entered at the May term of this court, A. D. 1866, when and where the parties appeared by their respective attorneys. This case was thence continued from term to term to the May term, A. D. 1867, when the following plea and issue is filed, namely:

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And now the defendant comes, when, &c., where, &c., and for plea says that he is not guilty in manner and form as the pl'ff hath thereof alleged against him, and of this he puts himself upon the country for trial.

By his att'ys, J. H. CLIFFORD.
CHARLES ALLEN.

Issue joined.

And the pl'ff, in his own person, doth the like.

SAMUEL H. RANDALL.

JUNE 12, 1867.

Verdict.

Issue being thus joined, the cause, after a full hearing, was committed to a jury, sworn according to law, to try the issue, who, after hearing all matters and things concerning the same, return their verdict therein upon oath, and say: The jury find that the defendant is not guilty in manner and form as the plaintiff in his writ and declaration, hath declared against him. This cause was thence continued to this present October term, A. D. 1867, when, to wit, October 24, it is considered by the court that the said Lincoln F. Brigham, defendant, recover of said Samuel H. Randall, plaintiff, his costs of suit, taxed at forty-four dollars and forty-two cents.

Bill of exceptions.

Upon the trial of the said cause after the evidence was closed on both sides, and before the issue was submitted to the jury, the said Samuel H. Randall, plaintiff, filed his bill of exceptions, which
12 was sealed and allowed by the court, and is in words and figures following:

13 Circuit Court of the United States, Massachusetts District, May Term, 1867.

SAMUEL H. RANDALL
vs.
LINCOLN F. BRIGHAM.

Be it remembered, that this cause came on for trial at the May term, 1867. It was an action of trespass on the case brought by the

plaintiff, a citizen of the State of New York, against the defendant, a citizen of the State of Massachusetts, for a disturbance, by the defendant, of the plaintiff, in his office of attorney-at-law. The writ and declaration are made part of this bill of exceptions. The defendant pleaded the general issue, and issue was joined thereon by the plaintiff. At the trial the plaintiff called and examined George C. Wilde, clerk of the Supreme Judicial Court of the Commonwealth of Massachusetts. He testified, among other things, that he had here in court the record of that court for the April term, 1860; that the plaintiff was admitted at that term as an attorney and
14 counsellor in all the courts of the commonwealth; that he took and subscribed the necessary oaths, and signed the roll of attorneys on the eleventh day of April, 1860. Inquiry was made of the witness whether the plaintiff, to his knowledge, attempted to appear in court and act as an attorney subsequently to the year 1864, and whether he had any cases in that court at that term. The witness testified that he had one or more cases in court at that term; that he had business on the docket and was in attendance, apparently, to argue a question of law before the court; that one of the justices suggested to the witness that he had better say to the plaintiff that he could not appear in the cause, as it would save trouble and delay, and that in consequence of that suggestion he, in some form, notified the plaintiff as requested. Plaintiff also inquired of the witness whether he had the record in any case in that court of proceedings against an attorney for his removal. The witness said he had the petition and other proceedings in such cases. Defendant objected to the admission of the record, and the court ruled that it was not admissible in evidence to the jury, but might be referred to in the argument to the court upon the questions of law. Plaintiff also called and examined Francis H. Underwood, clerk of the Superior
15 Court of the commonwealth, county of Suffolk, for the transaction of criminal business. He testifies that he was clerk of that court in 1860, and was so in 1864. Inquiry was also made of the witness if he had the docket of that court for the October term, 1864, and whether there were any entries on the docket in respect to the removal of the plaintiff, as a member of the bar, at that term of the court; whereupon the defendant objected to the reading of the docket entries upon the ground that they were not admissible to prove the records of the court after the record was made up. Before any ruling upon the subject was made by the court, the plaintiff introduced, by consent of the defendant, copies of the case in the matter of the plaintiff, petitioner for a writ of certiorari, marked A, and also copies of the case in the matter of the plaintiff, petitioner for a writ of mandamus marked B, to be used by either party, subject to any legal objection, and the same are made a part of the case. And the witness was further examined by the plaintiff, and testified that there was something on the record against the plaintiff; that the entry was made towards the last of November of that year; that the entry was extended from the order of the court handed to him by the presiding justice, of which the paper shown to the witness purported to be a

copy, but which was not introduced; that the first entry on the docket was made subsequent to receiving the record and
16 marking it to be copied; that there were no entries on the docket against the plaintiff made during October of that year, or the preceding September; that there was nothing pending on the docket against the plaintiff previous to the time when the presiding justice handed him that paper, to wit, the paper called the opinion and judgment of the defendant. There was a paper on file, a letter from Capt. Green, he thought; that the order was filed October 10th, 1864, Commonwealth *vs.* Samuel H. Randall, Judges opinion. Parties were then heard upon the question whether the docket entries were admissible; and the court ruled that they were not admissible at that stage of the case and excluded the same, to which ruling the plaintiff then and there excepted, and the court saved the question. The plaintiff further examined the witness, who testified that that paper, filed as aforesaid, was not the only paper ever on file in the case; that there was also a paper filed called a bill of exceptions. He also stated that there was a memorandum on it made by the defendant, and commenced to read it, when the defendant objected to the reading of the same, and the court ruled that the first step was to offer the paper in evidence, and see if any objection was made to its admissibility. Plaintiff said the bill of exceptions is a part of the record, but the court suggested that the record of the opinion
17 and judgment of the defendant had not been introduced, and thereupon the plaintiff introduced the record and read the last clause, beginning "upon the foregoing facts, &c.," and the remainder was read by the witness. (See copy of that opinion and judgment as appended to the plaintiff's petition for writ of certiorari and marked (F).) Plaintiff then offered the paper called the bill of exceptions, and it was admitted and read, and the same is made a part of the case. (See copy of that paper as appended to the plaintiff's petition for writ of certiorari and marked (G).) Particular inquiry was then made of the witness whether there was any other record than what had been read, or any notice or process of any kind in the case, and he answered "no, sir," and testified that there was not any paper in the form of a bill, petition, writ, information, or interrogations filed, nor any affidavit. Here the plaintiff again offered the docket entries, not as his counsel stated, to affect the record in any way, but for the purpose of showing that in point of fact the entry was made on the docket. (Objected to by the defendant and ruled out by the court.) The witness also testified that the name of the plaintiff, he supposed, was on the docket at that term as counsel, but not as a party. He stated, on cross-examination, that there was a paper on the files that term, relative to the plaintiff, signed by Capt. Green.

18 Plaintiff also called and examine Joseph A. Willard, clerk of the Superior Court of the commonwealth, in the county of uffolk, for the transaction of civil business. He testified that he had een clerk since April, 1865, and that he had been connected with he office more or less since 1846; that he knew the plaintiff as a

member of the bar, and that he had practiced considerably in the court, and that his name was on the docket there in pending actions. But after October, 1864, he was ordered by some member of the court not to receive any paper from the plaintiff, and not to recognize him as an attorney, and "I told him I had been so ordered, and that he must appear by other counsel."

The plaintiff was called and examined by his counsel, and testified as follows:

Q. What is your age?

A. Thirty-one.

Q. You were how old when admitted to the bar?

A. Twenty-three.

Q. In what place, town or city, did you practice law?

A. In Boston. In the Supreme Court, Superior Courts, and in the [the] other courts, and in the other County Courts in the State.

Q. Did you have any business out of Boston?

A. I had quite a business in Middlesex, and also in Norfolk.

Q. While you remained at the bar what progress did your
19 business make?

A. It doubled after the first two years; the third year it was $1,500; the year that I was removed I returned an income of $2.850, the amount I had received in the year 1864; for the year 1865, the amount that was then on hand, and the business I could have done if in the enjoyment of my office, ——.

Q. State the business you had on hand at the time of your removal from the bar?

A. I had, upon all the dockets, between twenty and thirty cases in the different courts; between twenty-five and forty cases in the different courts; Superior, Supreme, Police and Criminal. I had opportunities very frequently, after I had been removed, of taking good business, which would have yielded me fees of considerable magnitude, as well as minor amounts, that I was obliged to turn over to other attorneys, and in some cases I employed other attorneys to manage cases.

Q. What did you do with your cases pending in the courts at the time the order was passed?

A. In some of them, when I undertook to practice, the courts ordered non-suits; in others, substitution. I had three cases before the Supreme Court, and I undertook to practice there. The Chief Justice informed the clerk, in my presence, that I would not
20 be permitted to be heard, in consequence of the order of Judge Brigham, and I was obliged to employ other counsel at an expense of $200. The amount of business that was brought to me in 1865 would have amounted to between 4 and $5,000 for the year 1865. I had one client who would have given me between 1 and $2,000. He was engaged in a large collection business, and would have turned over all his business in the courts to me to conduct. I had a large criminal business. I am now speaking of cases actually brought to me, and when I was solicited to act as counsel. There

were quite a number of cases brought to me that I could not take, because I could not appear, and that I absolutely refused. I had suits on notes; some cases of defendants in Criminal Courts, indicted on various charges; others were suits upon judgments, and I had to employ another attorney. I had three cases in equity, where I was obliged to employ other counsel. They were suits for the respondents in equity.

Q. Your business had been active, and was a growing one at the time?

A. It was a very active and successful business. I had a large business for a young man.

Q. You returned what income in 1864?

A. $2,850; the previous year $1,500.

Q. You recollect whether you were ever notified in any form,
21 to appear before Judge Brigham in reference to the proceedings which resulted in his passing an order to remove you from the bar?

A. I do.

Q. From whom?

A. From Judge Brigham, in September, 1864. I came into court and Judge French said that a letter Judge Brigham was holding the court, and this was said in his presence; Judge French said to the court (he was asst. dist. attorney,) that during the conduct of a cause before the grand jury a letter had been produced, either by an officer, or sent by mail, of one Leighton to a Capt. Green, in which it was stated that I had promised Leighton $400; that there being nothing before the grand jury that would authorize him to take any action, it was suggested that the letter had better be brought to the attention of the court, and that he handed that letter to Judge Brigham. Judge Brigham asked me what I had to say to it. I told him I had become bail with the assent and agreement of the asst. dist. attorney in $400; that I had paid the man $110 on account of it; that I was ready to pay the balance $290, as soon as the dist. attorney should discharge the bail: that he had informed me he would if I had the man enlisted, and the indictment should be placed on file; that
22 I didn't consider his honor, as the matter then stood in court, had any right to inquire into it. I said, if any body had any complaint to make against me as an officer of the court, I desired the complaint in writing placed upon the record; that that would be the only proper way for me to take notice of it. He said he should inquire into it for his own satisfaction; that on the 21st he would inquire into my professional character and standing at the bar. I said that was a rather broad question; that if any body had any charges to make, I demanded that they be put on the record and to give me an opportunity to make an answer.

Q. Was your name on the record at that time?

A. No, sir; not as party or counsel in any shape whatever. I called the attention of the court to that fact. On the 21st an officer came for me, and said that Judge Brigham had sent for me to go into his court. When I got there, he said he proposed to go into my

professional character and standing at the bar. I said I protest and object to your honor's taking jurisdiction until some one has filed a charge against me, that I may know what I have to answer, and have an opportunity to answer it. He said "I don't deem it to be necessary. I shall go into the inquiry and hear the evi-
23 dence." I said in regard to the letter that had been brought to the court, that the man had then received his money; that there was no further ground of complaint; that I had done just as I agreed, and that there was nothing before the court. He said he should go on for his own satisfaction. I told him there was nothing I desired to conceal; that I stood by my action, and should do it again; but without waiving any rights, I was willing to satisfy him, but without waiving my rights to regular proceedings. The proceedings as read in the bill of exceptions then took place.

Q. Whether at that time, on the 21st day of September, the judge went into the inquiry?

A. Yes, sir; on the spot.

Q. Did you have counsel?

A. No, sir; I said, I thought I had a right to be heard by counsel. He said he would go into the inquiry for his own satisfaction. The matter went on in an informal way. The next thing that occurred, I called upon Judge Bringham at his house.

Q. How long did this last?

A. Between an hour and a half and two hours. I went to his house on the evening of Saturday the 28th or 29th of September, or the 1st of October. I told him I had felt alarmed at the
24 proceedings he had taken as they were presented before him; that I had been to see Judge Abbott, and told him what took place, and that Judge Abbott had looked into the matter, and said there was nothing wrong in it; that I was a young man with a good practice, and that I had better offer to do anything that the court required, to comply with any condition, or do what the court said should be done. I then told Judge Brigham that I was a young man; that I had been steady and industrious, and built up a practice then worth $3,000, and rapidly increasing; that it was very promising, and that I didn't want any question in regard to my professional character brought into the case; that I begged to assure him that I felt that as an attorney-at-law that I was entitled to have regular proceedings; that it was the practice that an attorney should have some form of charge, and be notified to appear and answer, and that anything he might do, without my knowing what it might be, I wanted to have an opportunity to guard against. I told him that Leighton had made no complaint, but was satisfied, and asked him what more could be done. He heard me through, and said there was nothing I could do or say that would alter the determina-
25 tion he had come to in the matter. I rose to go, and said that if anything was to be done that I wanted charges and should look to him for the result if I did not have them. The next thing was that I came into court, and Judge Brigham read the opinion, and then directed the clerk to enter on the docket an order

removing me from the bar in all the courts of the Commonwealth; and extend that order upon the records of the court; that was upon the 10th of October. I then rose, and told him that I denied his authority to enter any such order until he had jurisdiction by due process of law; that the bill of rights gave me a right to charges. He told me I had better inquire whether any charges were necessary. After that I tried to practice in the various courts. Some of the judges threatened to commit me; others said they would not inquire into the order until it was declared illegal and void. I tried to practice before Judge Lord, Judge Russell, and Vose. It was Judge Vose who threatened to commit me. I had a case where I was offered $100 to defend a man. Judge Vose called me to him and said he could not hear me. I said I never had had a process; that I should insist upon my right to practice. He said if I did he would commit me for contempt. I tried to practice at Cambridge,
26 and this same Judge Vose ordered non-suits. Judge Lord ordered non-suits. It broke up my business, and all I have earned since then has not exceeded 3 or $400. I have been engaged in no other business since that time, but depended wholly upon my professional income for my means of support, and to support my wife. It has ruined me entirely. I remember that French said to the court at this time that there was no complaint against me, and he saw no reason to make any. This was in the presence and hearing of Judge Brigham. Judge Brigham asked him if he would not put questions to witnesses, and Mr. French said he didn't know there was anything before the court, but that to accommodate the court he would. He said he saw no reason of complaint. The man had been bailed, and had received his money, and Judge French discharged me.

Q. Was any rule of the court exhibited to you?

A. No, sir.

Q. Any form of process?

A. No, sir.

Q. Any affidavit?

A. I never saw any.

Q. Any petition?

A. I never saw anything until Judge Brigham read his
27 opinion; then was the first time I knew what I was found fault with for.

Q. At any time was any regulation known to you forbidding an attorney to be bail?

A. There was none. The Superior Court had no such rule, and again it was not a case before that court. It was done with the approval of the dist. attorney, who told me I might do it.

Q. State whether you attempted to get any revision of this order?

A. I employed Mr. Fiske to get redress by certiorari at an expense of $100, and in the case of mandamus there was an expense of something like $60. Mr. Paine was my counsel in that case. I paid him a retainer of $100, but he returned it to me, and would not take any fee. He said I was welcome to his services.

Q. Is there anything relating to the transactions between yourself and Judge Brigham in your memory, which you have not stated?

A. No, sir.

Mr. Andrew put in Mr. Randall's U. S. license for the year commencing May, 1864, and the year commencing May, 1865, which are made a part of the case.

Cross-examination:

Q. Did you, before these proceedings, (certiorari and mandamus,) ever come into collision with Judge Brigham in any way?

28 A. The only way I ever knew that Judge Brigham had any collision with me before this, was from a statement made to me by Mr. Searle. It was a statement that Judge Brigham made to him, and he informed me of it.

Q. Did you ever show any incivility to him in court before this?

A. I never had.

Q. Did you ever, in court, come into collision with him?

A. I never did.

Q. You never, in any way, behaved uncivilly towards him personally?

A. No, sir. I always treated him as I did all the others, respectfully.

Q. How had he treated you?

A. I never had, as far as the extent of my practice, which had been very limited before him he treated me as any other person in the profession.

Q. You have no cause of complaint before this time?

A. No, sir.

Q. Did you ever have any cases before him?

A. I had, I think, one or two.

Q. You had practiced in court, before him as judge?

A. Yes, sir.

Q. At the time of this first hearing that you speak of—that was on the 16th day of September?

29 A. I know it was before the 21st; some days before.

Q. What day of the week was it?

A. I can't undertake to say. I think it was 3 or 4 days before the 21st.

Q. Saturday, was it not?

A. I could not say.

Q. At that time you were notified to be present there?

A. An officer came to my office, and told me I was wanted in court.

Q. Judge French appeared in the matter?

A. He did not.

Q. He made a statement to the court?

A. He said that a letter from one Leighton to a Capt. Green had been placed in his hands, and that it was suggested that he had better call the attention of the court to that letter.

Q. Who suggested it? Did he say?

A. He said it was produced before the grand jury; and, as they had no case there, the foreman suggested it had better be brought to the attention of the court.

Q. Accordingly he brought it to the attention of the court?

A. He did.

Q. Is that the letter set out in the bill of exceptions, read yesterday?

A. It is; and the one also in Judge Brigham's opinion.

30 Q. The order was, then, that the ass't district attorney stated to the court that the foreman of the grant jury requested him to bring that matter to the attention of the court?

A. Yes, sir.

Q. Didn't Mr. French examine witnesses then, at that time?

A. He did not.

Q. Was he not appointed to conduct those proceedings by the court?

A. Not at that time.

Q. When was he?

A. On the 21st.

Q. At the next hearing?

A. Yes, sir.

Q. You are confident that he did'nt conduct the proceedings that day?

A. I am confident that there was no proceeding on that day other than the court asking me what I had to say about that letter.

Q. Was there no witnesses examined that day?

A. There were none.

Q. Were you put on oath yourself?

A. I was not.

Q. You said there was an hearing an hour and a half or two hours?

A. That was on the 21st.

Q. There was no proceeding, then?

31 A. No, sir; only the statement that I made, that if there were to be any charges against me, I wanted them made in writing, so that I could reply to them.

Q. You didn't make any argument on that case on that day?

A. No, sir.

Q. You made no statement?

A. I said I stood by what I did, and that his honor had no right to look into the matter in that form until it was brought officially before him; that all my rights should be preserved and protected, and that I was entitled to written charges.

Q. That was all?

A. Except that Judge Brigham said he should go into an inquiry of my personal standing on the 21st.

Q. Did you make any statement as to what the facts were?

A. I did.

Q. Fully?

A. Three or four minutes.

Q. Not more than that?
A. No, sir.
Q. Not under oath?
A. No, sir.
Q. You stated what the facts were?
A. I did. I told him I had become bail——
32 Q. You made a statement of the case?
A. I did make a statement
Q. You then told him that you still stood by what you had done, and that you had done nothing but what was right?
A. Yes, sir.
Q. You say so now?
A. Yes, sir.
Q. You mean to testify here that on that day, when this matter was first called to your attention, and when this letter from Leighton to Capt. Green was first produced, that you then demanded that charges in writing should be filed against you, if any were to be made?
A. I did.
Q. You got $830 for that enlistment?
A. That was the amount paid to the brokers.
Q. That was what was to come to you?
A. That was the whole amount.
Q. On that day, when this matter was first called to your attention, you had paid Leighton only $10.
A. $110.
Q. You are confident about that?
A. I am positive. I paid $10 to him, and $100 on his order, paid to Quinn in the early part of September, and held the balance subject to the discharge of the bail.
Q. You had got the money at that time?
33 A. Yes, sir; but not when I enlisted him nor some days after.
Q. You had got $830, and had paid out $110?
A. At that time.
Q. That left $720 you had got?
A. Yes, sir.
Q. Then it came round to the hearing on the next Wednesday, after that hearing on the 16th of September. After that time, when this matter first came up, did Judge Brigham make any suggestion to you in any form that you had got too much money there?
A. He never in the world made any such statement.
Q. He didn't intimate that he thought it was extortionate to get so much money for what you had done?
A. He never expressed any opinion of that kind. He said any dealing between an attorney and client ought to be inquired into by the court.
Q. As to that suggestion, as to whether you had got an extortionate sum, whether he made any suggestion of that sort, that it seemed to him extortionate to take $830 or $720?
A. I would not swear that he didn't.
Q. On that day?

A. On the first day, on the 16th, I told him I was to receive that amount.

34 Q. You had received it then?

A. Yes, sir, I had. I told him I had that amount.

Q. Didn't Judge French promise you should not be called upon at that time?

A. No, sir; only on proof of enlistment. He had not discharged the bail then.

Q. Had he not promised you that you should not be called upon on your bail?

A. He had not; he made me no absolute promise nor gave me any assurance that I should not be called upon.

Q. Did he not tell you he had placed this indictment on file?

A. It was not until after this.

Q. Did he not tell you if the indictment was returned he would place it on file?

A. He said he would on proof of enlistment; that had not been made to him at that time.

Q. If this man had enlisted he would put it on file, and in that case not call upon you—he promised that?

A. He did.

Q. In case you got this man enlisted and proved it, you were not liable on your bail?

A. That had not taken place.

Q. That fact is so?

A. That is a matter of argument.

Q. You had got his promise not to hold you on bail?

35 A. I could not depend upon it with certainty. I had not got his promise absolutely.

Q. Could you not depend upon his promise?

A. I took the risk of doing it. I held it was still an unexecuted contract between him and me for which I ought to secure myself.

Q. Did you not testify at that hearing, that Judge French said if the plaintiff acknowledged satisfaction the matter could be adjusted; and if an indictment was found he could place it on file upon proof of enlistment, or upon acknowledgment of satisfaction by Quinn?

A. That is all true; still he had not done it.

Q. Did you not tell Leighton you could not tell him until after the grand jury reported?

A. I told him I could not pay him the amount other than the $10, and the $100 until the bail had been discharged, and that I would not do it.

Q. Did you not tell him you could not tell him anything about it until the grand jury had reported?

A. I could not tell him what would be the result, whether the bail would be discharged or not.

Q. Did you not contend at that hearing that you were not liable to pay him the $400?

A. At the first hearing he had received $110; at the second $400.

36 Q. Did you not contend at the first hearing you were not liable to pay a cent?

A. That until the bail was discharged I was not in any form of obligation, legal or otherwise, obliged to pay him a dollar.

Q. Did you not contend you had a right to keep that whole money?

A. I did not.

Q. Did you not stipulate that you should keep the whole?

A. That was so the government should not make a claim upon me when the man went on board. It was to protect myself.

Q. When you took the agreement in writing, that "in consideration of furnishing bail, he should pay $400, and you should have that $400, and all the rest you received," that was not the real agreement?

A. The real agreement was the oral condition. That agreement was made absolute upon its face, with the oral condition made before Leighton, my brother, and the brokers, that he should receive, upon discharge of the bail, $400, but not otherwise.

Q. That is what you testified to?

A. Yes, sir.

Q. In that opinion, read yesterday, when Judge Brigham
37 states that you contended you had a right to have the whole of the money, and that Leighton contended that he was to have $400, he states what is not true?

A. You can make your own inference. I state facts.

Q. You didn't contend any such thing?

A. I have stated the fact. He states there were charges exhibited against me, which I also state was not true.

Q. Did you not set forth, in this bill of exceptions, that the amount of $400 was paid before this inquiry was begun by the court?

A. I did; it was true.

Q. You didn't call that first day anything?

A. I didn't, because on the 21st I was notified that my professional standing at the bar would be inquired into.

Q. You didn't call that first day anything?

A. Not at all.

Q. Now, in reference to your income, when you gave in $2,850, how much of that was made up of what you got out of this matter?

A. I think there was very little left of that matter.

Q. Can you tell how much was made up out of this matter?

A. I put in the whole of my income for that year.

Q. You put in what you got out of this?

A. Yes, sir. After everything had been paid, $125 for enlistment expenses, and so forth, I had about $250.

38 Q. Did you furnish any liquor to this man?

A. I did not; but I gave him some money to buy some.

Q. How much?

A. Half a dollar or so. I don't remember.

Q. Was that counted in amongst the expenses of this matter?

A. No, sir.

Q. That was a gratuity?

A. Yes, sir.

Q. Did you give him some liquor to take into his cell?

A. I could not say I did.

Q. Do you remember whether he testified at that hearing that you did?

A. I do not.

Q. In regard to your income that you testified to, were you in the habit of making pretty heavy charges for your services?

A. I always got paid pretty well for the business I did.

Q. Were not your charges found fault with?

A. Not as a general thing.

Q. Did it ever happen to you that at one time you charged $75 for taking a deposition, and the chief justice of that court cut you down to $3?

A. No, sir.

Q. Did you that year have any other such case as this one?

39 A. No, sir.

Q. Were you employed in the bounty business?

A. No, sir.

Q. Did you have an office with your father and your brother?

A. No, sir. I had an office alone.

Q. Were they engaged in that business?

A. They were not.

Q. Did you have anything to do with the enlistment of any other man in the army or navy, in the course of your practice, before your removal?

A. No, sir.

Q. This was the first time?

A. Yes, sir.

Q. Did you institute any proceedings against Chief Justice Bigelow for impeaching him before the legislature?

(Objected to and ruled out.)

There were also read to the court in this case certain provisions of the general statutes of Massachusetts as evidence of the local laws of said State, which are contained in the paper hereto annexed and marked C, and which may be referred to.

There were also shown to the court, in the argument of the questions of law arising out of the defendant's prayer for instruction in this case, various precedents of practice in the Supreme, Judicial, and Superior Courts of Massachusetts, in proceedings for the

40 removal of attorneys-at-law, all of which may be referred to.

The plaintiff here rested his case, and the defendant, without offering any testimony in his behalf, requested the court to instruct the jury that, upon the plaintiff's evidence, the action cannot be maintained, and that the verdict of the jury should be for the defendant, and the court instructed the jury that, upon the plaintiff's evidence, the action in judgment of law cannot be maintained, and that their verdict should be for the defendant. The jury thereupon rendered their verdict for the defendant, as exhibited in the record.

The plaintiff then and there in open court, before the jury retired from the bar, excepted to the ruling, instruction, and direction of the

court, and requested that his exceptions might be signed and sealed, and inasmuch as the matters herein set forth do not appear in the record, the same have been reduced to writing, and being found to be correct, this bill of exceptions is allowed, signed, and sealed by the court, and directed to be filed as of the fourteenth day of June, 1867, before the jury left the bar.

Given under our hands and seals as of the day and year above mentioned.

[L. S.] NATHAN CLIFFORD,
Associate Jus. Sup. Court U. S.

[L. S.] JOHN LOWELL,
District Judge.

41 A true record.
Attest: JOHN G. STETSON, *Clerk.*

Clerk's certificate.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, Clerk of the Circuit Court of the United States for the said district of Massachusetts, hereby certify that the foregoing is a true copy of the record and of all proceedings in said entitled cause of Samuel H. Randall, plaintiff, *vs.* Lincoln F. Brigham, defendant, in said Circuit Court determined.

And I further certify that the papers hereto annexed and marked, respectively, paper annexed to bill of exceptions, A, paper annexed to bill exceptions, B, and paper annexed to bill exceptions, C, are true copies of the papers referred to in said plaintiff's bill of exceptions, and respectively marked A, B, and C, and made a part of the case.

Witness my hand and the seal of said Circuit Court, at Boston, in said district, this fourth day of November, A. D. 1867.

[SEAL.] JOHN G. STETSON, *Clerk.*

[5 cent revenue stamp.]

42 *Petition for certiorari.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

To the honorable the Justice of the Supreme Judicial Court, within and for said county of Suffolk:

Respectfully represents your petitioner, Samuel H. Randall, of Boston, that at the Supreme Judicial Court, begun and holden at Boston, within and for said county of Suffolk, on the first Tuesday of April, A. D. 1860, your petitioner was duly admitted to practise as an attorney, and by virtue thereof as a solicitor-at law, in all of the courts of said Commonwealth; that your petitioner had continued to practice in his said office, and had always demeaned himself therein

with all due fidelity, as well to the courts as to his clients, until the October Term of the Superior Court, (criminal session thereof,) within and for the county of Suffolk, when certain proceedings were had, in the nature of judicial proceedings, in behalf of the
43 Commonwealth against your petitioner, under the provisions of sec. 34, of chapter 121, of the general statutes for the removal of attorneys, whereby said Superior Court claim to have regularly and lawfully removed your petitioner from his said office, and further claim your petitioner has no right of exception from the rulings and decision by said court made in the premises.

And your petitioner represents, that said proceedings were not according to the course of the common law.

That there never was any information, complaint, or petition filed against your petitioner by the district attorney, or any person whomsoever, before said court, or any process of any kind, whereby to have given said court jurisdiction in the premises; that there is substantial error in said proceedings; that they are manifestly illegal, wrongful, irregular, prejudicial, and unjust to the rights of your petitioner, who at all times protested and objected to said proceedings in the manner in which they appeared, and were con-
44 ducted before said court; that by the very nature of said proceedings, your petitioner has been deprived of his right (by the refusal of said court to allow his exceptions, he feeling aggrieved at the rulings and decision of said court) to enter a petition before the Supreme Judicial Court, to establish the truth of the same, inasmuch as there is no legal record in said court, which could be availed of by your petitioner, as a foundation for said proceedings, whereby said exceptions could properly be brought before said Supreme Judicial Court for consideration.

And your petitioner further represents, that upon the merits of the matter involved in said proceedings, as disclosed by the evidence, it nowhere appears that your petitioner has violated his oath of office, or any professional trust or obligation, or acted oppressively or unjustly, or been guilty of any malpractice or professional misconduct whatsoever, or from any cause, legally or equitably, merited removal from his office of attorney by the court.

Wherefore your petitioner prays, that a writ of certiorari
45 may be issued to the Justices of said Superior Court, directing them to certify up the record of said proceedings to this court; that the same may be quashed and annulled, and that such further order and decree may be passed as law and justice require.

SAMUEL H. RANDALL.

[50 ct. stamp.]

Supreme Judicial Court, October Term, 1864.

Order of Court.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

On the foregoing petition, it is ordered that the petitioner give notice to the district attorney for Suffolk district to appear before

the judges of this court, to be holden at Boston, within and for said county of Suffolk, on the second Tuesday of January next, by adjournment from the first Tuesday of October last, by serving him with an attested copy of said petition, and of this order thereon, fourteen days at least before said second Tuesday of January next, that he may then and there show cause why the prayer of said petition should not be granted.

Dec. 17, 1864.

By the Court:

GEO. C. WILDE, *Clerk.*

SUFFOLK, *ss*:

BOSTON, *Dec.* 22, 1864.

I this day gave, in hand, a true copy of the within petition and order thereon, attested by the clerk of this court, to George P. Sanger, esquire, attorney for Suffolk district.

BENJ. F. BAYLEY,
Dep'y Sheriff.

46 Supreme Judicial Court, October Term, 1864.—In the matter of Samuel H. Randall, petitioner for certiorari.

Report on Petition.

SUEFOLK, *ss*:

Notice of the pendency of this petition having been served upon the district attorney for the county of Suffolk, he appeared before me and answered orally.

The petitioner produced a certificate of his admission to practice as an attorney in any of the courts of this Commonwealth, at the April term of this court, 1860, (annexed and marked "A.") Also a certificate of Henry Homer, esq., marked "B." Also a certificate of Joseph A. Willard, esq., marked "C." Also a certificate of George W. Nichols, esq., marked "D." Also the petitioner's affidavit, marked "E." Also a copy of the opinion and decision of Lincoln F. Brigham, in the proceedings against the petitioner. Also a copy of the bill of exceptions prepared by the petitioner and presented to the judge, and his certificate refusing to allow the exceptions.

It was admitted by the district attorney, that there is no other record of any complaint or proceedings against the petitioner than that which is contained in these papers, and that, since the decision of the judge, the petitioner has not been permitted to practice as an attorney in the Superior Court.

On these facts and documents, the case is reserved for the consideration of the whole court.

R. A. CHAPMAN,
Justice S. J. C.

B.

OFFICE OF CLERK OF SUPERIOR COURT, (CRIMINAL,)
ROOM NO. 22, COURT HOUSE,
BOSTON, *March* 1, 1865.

In relation to the matter of S. H. Randall, there is no written process of any kind, containing any charges against Mr. Randall, on file in this court. All that the dockets of this court shew is the following entry: "In the matter of S. H. Randall, attorney-at-law, Oct. 10, 1864. The Hon. L. F. Brigham, presiding justice, directed the clerk to enter upon the docket an order, removing said Randall from the bar, and to extend said order upon the record of this court. Entry made in record at this time; made in docket this 20th Jan., 1865."

HENRY HOMER,
Clerk pro tem.

47

C.

SUFFOLK, *ss.*

I hereby certify that there is no record upon any of the dockets of the Superior Court, under my charge, of the removal of S. H. Randall as attorney, or of any proceedings relating thereto.

Jan. 13, 1865.

JOS. A. WILLARD,
Asst. Clerk.

D.

JAN. 13, 1865.

I hereby certify that on the 26th of April, A. D. 1860, at the April Term of the Supreme Judicial Court, for the county of Suffolk, Samuel H. Randall, esq., was duly admitted to practice as an attorney, and by virtue thereof, as a counsellor-at-law, in any of the courts of the Commonwealth of Massachusetts; and there is no evidence in the clerk's office of said court of his being removed by said court from said office of attorney, and his name still appears upon the records of said court, as when he was admitted.

GEO. W. NICHOLS,
Asst. Clerk of said Court.

E.

"*Affidavit verifying facts stated in petition.*"

F.

Judge Brigham's Opinion.

In the matter of Samuel H. Randall, an attorney-at-law, against whom charges of professional misconduct and malpractice have been

made before this court, after a full hearing, the following facts have been found:—

One Michael Leighton, on the 16th of August last, was confined in the jail at Boston, because of his failure to recognize, as ordered by the Police Court of Boston, in the sum of $400, to appear and answer in the Superior Court, at the following September term, to the finding of the grand jury, upon the accusation of one John Rogers that said Leighton had committed the crime of larceny by stealing United States treasury notes of the value of $100, the property of John Quinn.

While thus confined said Leighton,—and whether this occurred upon his own solicitation, or upon the solicitation of said Randall, was the subject of contradictory evidence—employed said Randall to act as his counsel in the matter of said complaint; and said Randall undertook so to do. Said Leighton declared his readiness to enlist either in the army or navy of the United States, if the prosecution of said camplaint could be discharged upon his so doing; and said Randall, as said Leighton's counsel, applied to the assistant district attorney of the county of Suffolk for an agreement to dispose of said prosecution on these terms. This agreement the dis-
48 trict attorney declined to make, at that stage of the prosecution, but encouraged said Randall to expect that he would not oppose such an arrangement in the Superior Court, if approved by the judge presiding there, when any indictment against said Leighton was presented.

Without any more definite arrangement with the district attorney, said Randall and his father became the sureties of said Leighton, upon his recognizance in the sum of $400, to appear in the Superior Court. Said Leighton proceeded immediately afterward to said Randall's office, where the following document was made; said Leighton not being able to read or write.

BOSTON, *Aug.* 16, 1864.

I, Michael Leighton, do hereby agree with S. H. Randall to enlist as substitute for J. R. Brown, of Lowell, for $400, which shall be retained and kept by said Randall, without any claim hereafter to be made by me, to indemnify and save him harmless from the liability assumed by him in becoming surety for my appearance at the September term of the Superior Court; and I do also pay him said amount of $400 in consideration of his furnishing bail for me. And I further agree to acknowledge the receipt of $400 before the recruiting officers upon my enlistment.

his
MICHAEL × LEIGHTON.
mark.

Witness: C. L. RANDALL.

On the same 16th day of August, said Leighton enlisted as landsman for three years in the naval service of the United States, as the substitute of J. R. Brown, of Lowell, who paid to said Randall, in consideration of said enlistment, the sum of $830.

When, in pursuance of said enlistment, said Leighton went on board the receiving ship "Ohio," said Randall paid to him the sum of ten dollars.

John Quinn went on board the ship "Ohio," and procured from said Leighton the following order:

"Be it known that I, Michael his + mark. Leighton, of Boston, in the county of Suffolk and Commonwealth of Massachusetts, now in the United States naval service on board the U. S. receiving ship "Ohio," do hereby transfer, make over, and assign to John Quinn of said Boston, laborer, the sum of one hundred dollars out of the amounts of money due to and belonging to or credited to me in the hands of Capt. W. Green Howe, provost marshal of the board of enrolment of the fourth congressional district of Massachusetts, and also in the hands of S. H. Randall, esq., of said Boston, counsellor-at-law, to have and to hold the said sum of one hundred dollars to said Quinn, his legal representatives and assigns for ever.

"Charlestown, Aug. 22, 1864.

[L. S.] "MICHAEL his + mark. QUINN."

Witness: C. H. DILLOWAY.

Upon presentation of this document to said Randall, he prepared, and caused said Quinn to execute, the following documents, paying him at the same time the sum of $100.

49 BOSTON, *Aug.* 23, 1864.

Received of Michael Leighton one hundred dollars, in full of all demands held by me against him to date, for money received by him from me.

JOHN QUINN.

BOSTON, *Aug.* 24, 1864.

To Hon. JUDGES SANGER and FRENCH,
District Attorneys for County of Suffolk.

SIRS: Michael Leighton, who was arrested on complaint made to the Police Court for larceny of $100 from me, and who, having there waived an examination, was bound over to answer at this September term of the Superior Court for criminal business, has returned to me the sum of $100.

So far as I am concerned, I have no desire to prosecute him; and not knowing but he may have taken it for safe keeping and intended to return it to me, I recommend that the prosecution be discontinued, if in your own judgment it be proper.

Yours respectfully,

JOHN QUINN.

On the evening of September 6, John S. Hunt, a police officer presented to said Randall the following document:

U. S. RECEIVING SHIP OHIO,
Sept. 6, 1864.

CAPT. GREEN.

SIR: I enlisted in the naval service of the United States the 15th August, 1864, for which enlistment I was promised the sum of four hundred ($400) dollars by Samuel H. Randall, a lawyer occupying No. 3 room, Barristers' Hall, Boston. The only money, however, that I received was ten ($10) dollars, paid me by said Samuel H. Randall. I have seen Mr. Randall on board ship twice since I have been here; have asked him if he intended to settle with me for the balance, but have both times received evasive answers. I now appeal to you, sir, as commander of this ship, to see that justice be done me, as I have a wife and two children, residents of Boston, who are dependent on me for support; and the money therefor which this Randall has, but which rightfully belongs to me, would be gratefully acceptable for my family's support. I have been drafted for the east gulf squadron, and would like to have this matter settled before leaving, and it occasions me much uneasiness.

With respect, your obedient servant,
MICHAEL LEIGHTON.

Before the delivery of this letter to said Randall, the following indorsements were made upon it:

Will Mr. Randall give this his earliest attention, as the "Connecticut" sails to-morrow.

Respectfully,
C. GREEN, *Captain.*

"Ohio," Sept. 6, 1864.

Please send a man in his place.
S. H. STRINGHAM, *Commandant.*

50 Upon reading this letter and its indorsements, said Randall replied that he had paid Leighton all he had agreed to, and should not pay him another cent.

An application was also made to Randall, by the wife of Michael Leighton, for a portion of what she claimed to be her husband's bounty in the hands of Randall. In application she stated to him that the destitution of herself and of her two children was such that she should be obliged to give them up to the city, to which statement he replied by advising her to do so, and give her no money.

An indictment against Michael Leighton for the larceny of John Quinn's property was presented in the Superior Court on Sept. 12, and on the 16th of September he was called to plead to said indictment, and the attention of the court was directed to the foregoing facts, by the Grand Jury, and said Randall notified that upon the following Wednesday, Sept. 21, the matter of his professional conduct and standing at the bar would be considered.

At the hearing, which took place on said Sept. 21, said Randall exhibited the following letters:—

SEPT. 20, 1864.

Mr. RANDALL: The government will make no claim against you or your co-surety as bail in the case Commonwealth *v.* M. Leighton.

HENRY F. FRENCH,
Assistant District Attorney.

SEPT. 20, 1864.

Mr. M. LEIGHTON:

SIR: The government having this day relinquished any claim against the two sureties who were bail in your case for $400, I take pleasure in enclosing you the amount which the government might otherwise have claimed, and which the sureties expected to pay, less the amount of $100 already paid by me, on your order to Mr. Quinn, and the ten dollars cash received by you, making $400 in all.

Yours truly,

S. H. RANDALL.

Said Leighton claimed that his contract with said Randall was, that in consideration of said Randall's paying to him the sum of $400, and procuring the discharge of the prosecution against him for larceny, he, said Leighton, would enlist as a substitute in the army or navy, and said Randall should receive all of the avails of said enlistment.

Said Randall claimed that his contract with said Leighton was, that in consideration of said Leighton's enlisting as a substitute in the army or navy of the United States, and allowing said Randall to receive and have all of the avails of said enlistment, he, said Randall, would procure his discharge from the prosecution for larceny. And said Randall claimed, that he assured said Leighton, orally, that if he was not obliged to pay the sum for which he had recognized, he would pay the whole or a part of the same to him. As evidence of what the contract was, said Randall exhibited and relied upon the writing signed by said Leighton.

51 Said Leighton, when confined in jail, had no desire or intention to enter into the war service of the United States, until said Randall proposes to him to do so, as a means of avoiding the prosecution of said complaint for larceny.

Said Leighton had the belief that said Randall, as an attorney-at-law, and as his counsel, could, and would, procure his discharge from said prosecution. Induced by this belief, his desire to be released from confinement in jail, and his fear of ultimate conviction and punishment upon said complaint, he entered into a contract with said Randall to enlist as a substitute in the army or navy of the United States for the term of three years, said Randall— as said Leighton states the contract—to receive all the money which should be procured by means of said enlistment, excepting the sum of $400, which was to be paid to said Leighton; or said Randall, as he states the contract, and exhibits it in writing, to receive all the money which should be procured by means of said enlistment.

Said Randall intentionally and knowingly gave said Leighton just cause of this belief, and availed himself of it to obtain from him a contract, which, on the part of any person contracting with him in such a matter, under the circumstances which beset him, would have been unconscionable and extortionate; and which, on the part of an attorney-at-law, dealing with a client who was ignorant, incapable, and fearful, and confided in him as his counsel, as a man in that condition would be likely to do, was not only unconscionable and extortious, but grossly unprofessional, and a violation of law.

Irrespective of the lawfulness or propriety of said contract, it may be further said that its operation was almost wholly injurious to said Leighton. In compliance with it, he has entered the naval service of the United States so as to expose himself to the toil and hazard of a terrible war, for the term of three years, in consideration of which his counsel has received the sum of $830, of which money, until after the attention of this court was directed to the matter by the Grand Jury, and it was publicly notified, said Leighton has received only ten dollars. Moreover, notwithstanding said Leighton's entire compliance with his contract, he has not been discharged from the prosecution of the complaint for larcency, the avoidance of which was the sole moving cause in his mind, of making the contract. For according to said Randall's statement and exhibition in writing of the contract, said Leighton neither stipulated for, nor expected to receive, any money, as a condition of his enlistment, and the payment of ten dollars to him was an act purely of personal kindness by said Randall.

The services of said Randall to said Leighton, in compliance with said contract, and his relation to him as counsel, consisted of an unsuccessful solicitation to the assistant district attorney for his consent to the discharge of said prosecution upon said Leighton's enlistment. The reply to that solicitation did not warrant the assumption of such consent at a future time, upon which said Leighton or said Randall could safely reply and proceed in the enlistment. Yet immediately after the failure to procure this consent, said Randall caused said Leighton to be enlisted, as if the discharge sought had been procured, and it is inferred that said Leighton submitted to the enlistment under the influence of a belief that such was the fact. The second service rendered by said Randall to said Leighton, was
52 the payment of $100 to John Quinn. This payment had no legal tendency to procure said Leighton's discharge, and did not so operate, as the prosecution afterward proceeded to indictment not probably without the co-operation and evidence of said Quinn. This payment appears, by the documents which furnish the only evidence of it to have been a transaction of an unusual and equivocal character. From one point of view, it has the aspect of a restitution to said Quinn by Leighton, through said Randall, of stolen property. It has also an aspect which excites reasonable suspicion of an intent by the parties to it to compound a felony. The third service rendered by said Randall to said Leighton was to become his surety, in violation of the rules of this court, and obtain his father as

a co-surety upon said Leighton's recognizance to appear in this court. This service enabled said Leighton to be enlisted, and the enlistment was very likely to place him where the process of the Commonwealth could not arrest him; and so indirectly and uncertainly operated to postpone, and perhaps ultimately to defeat the prosecution. It did not otherwise tend to discharge the prosecution; and it does not appear that said Leighton made this contract because he desired, expected, or supposed said Randall, as his counsel, would serve him, by enabling him to become a fugitive from justice.

These three are all the services rendered by said Randall to said Leighton in compliance with said contract, and his relation to him as his counsel, prior to the time when he replied to said Leighton's claim for a settlement, "that he had done all he had agreed to," which was on Sept. 6, when he had been compensated for said services in the sum of $720.

The payment by said Randall to said Leighton of the sum of $200, between the time when said Randall was notified of the charges made against him in this court, and the time appointed for their investigation, although it tended to alleviate the hardships of said Leighton's position under said contract, furnishes no controlling consideration in determining the character of said contract and Randall's conduct under it.

Upon the foregoing facts the court find that said Samuel H. Randall, in the making of said contract, in his acts in pursuance of it, and in his relations to said Leighton as his client, and affecting his interests, violated his oath of office as an attorney-at-law, and was guilty of malpractice and gross misconduct in his said office; and the judgment and order of the court is, that for these causes he be removed from the office of an attorney-at-law within this commonwealth.

LINCOLN F. BRIGHAM,
Justice of Superior Court.

A true copy of the original.
Attest: HENRY HOMER,
Clerk pro tem.

The following appears on the back of the foregoing paper: "Commonwealth *vs.* Samuel H. Randall. Judges opinion. Oct. 10, 1864. Filed in court. H. Homer, clerk pro tem."

53 G.

Superior Court.—Criminal business.—Before Judge Brigham.—In the matter of S. H. Randall, attorney-at-law.

Said Randall's bill of exceptions.

SUFFOLK, *ss:*

And now comes said Randall, and represents that in above matter the following proceedings were had at hearing on Sept. 21,

1864. When the court proposed to go into the inquiry into said said Randall's conduct, said Randall objected that there was no record, document, paper, or anything else, either written or printed, or any charge, information, allegation, or complaint against said Randall to affect said Randall as an attorney and counsellor-at-law, or any proceeding whereby he might know what he was called to plead or answer to before the court; and objected to any inquiry, or to the court's taking jurisdiction in the premises, until some complaint or charge had been filed of record against him; that notwithstanding the presiding judge overruled the objections, and ruled that he would preceed in the inquiry and hear the evidence.

At said hearing, on the 21st of September, 1864, the following facts were adduced: Assistant District Attorney French stated that Michael Leighton was indicted at the September term of the Superior Court for the larceny of $100 in treasury notes from John Quinn. The subject of Leighton's enlisting was mentioned to him about the middle of August, while Leighton was in jail, by Mr. Randall, and he stated he had no ojection, if Quinn was satisfied that the money was not taken with intent to steal, and did not wish to prosecute.

The following letter was put in by Mr. French, which had been sent to him while Leighton's case was before the grand jury through the chief of police:

U. S. RECEIVING SHIP OHIO, *Sept.* 6, 1864.

Capt. GREEN:

SIR: I enlisted in the naval service of the United States the 15th August, 1864, for which enlistment I was promised the sum of $400 by Samuel H. Randall, a lawyer, occupying room No. 3, Barrister's Hall, Boston. The only money, however, that I received was (10) ten dollars paid me by said S. H. Randall. I have seen Mr. Randall on board ship twice since I have been here; have asked him if he intended to settle with me for the balance, but have both times received evasive answers. I now appeal to you, sir, as commander of this ship, to see that justice be done me, as I have a wife
54 and two children, residents of Boston, who are dependent upon me for support; and the money therefor which this Randall has, but which rightfully belongs to me, would be gratefully acceptable for my family's support. I have been drafted for the East Gulf squadron and would like to have this matter settled before leaving; and it occasions me much uneasiness.

With respect, your obedient servant,

MICHAEL LEIGHTON.

Upon which letter was the following: Will Mr. Randall give this earliest attention, as the "Connecticut" sails to-morrow.

C. GREEN, *Captain R. S. Ohio.*

Sept 6, 1864.

Please send a man in his place.

S. H. STRINGHAM, *Commandant.*

But no proof was offered to show that said letter was ever written by said Leigton, or signed by the other parties.

Also the following letter which he had received:

BOSTON, *Aug.* 24, 1864.

To Hon. Judges SANGER and FRENCH,
District Attorneys for Suffolk county:

SIRS: Michael Leighton, who was arrested, on complaint made to the police court, for larceny of $100 from me, and who having then waived an examination, was bound over to answer at this September term of the Superior Court for criminal business, has returned to me the sum of $100. So far as I am concerned, I have no desire to prosecute him, and not knowing but he may have taken it for safe-keeping, and intended to return it to me, I recommend that the prosecution be discontinued, if in your judgment it be proper.

Very respectfully,

JOHN QUINN.

This letter was laid before the grand jury, together with the following receipt which he had received:

BOSTON, *Aug.* 23, 1864.

Received of Michael Leighton one hundred dollars, in full of all demands held by me against him to date, for money received by him from me.

JOHN QUINN.

Judge French stated that probably there would have been no bill found upon this letter and receipt, but for Leighton's letter to Capt. Green, and that a bill was returned against Leighton for the sake of having the matter of Leighton's letter to Capt. Green inquired into, and that the grand jury had suggested that he call the attention of the court to this letter; that this was all he could do. There was no complaint against Mr. Randall, and he should make none himself, and presented to the court the following letters:

55 *Sept.* 20, 1864.

Mr. RANDALL: The government will make no claim against you or your co-surety as bail in the case of Commonwealth *vs.* M. Leighton.

HENRY F. FRENCH,
Assistant District Attorney.

Sept. 20, 1864.

Mr. M. LEIGHTON:

SIR: The government having this day relinquished any claim a against the two sureties who were bail in your case for $400, I take pleasure in enclosing you the amount which the government might otherwise have claimed, and which the sureties expected to pay, less the amount of $100, already paid by me on your order to Mr. Quinn, and the ten dollars cash received by you, making $400 in all.

Yours, truly,

S. H. RANDALL.

Michael Leighton testified that he first saw Randall while in jail, as he was passing his cell to visit a client; that Randall asked him what he was in for, and he said that it was for taking money; that he was innocent, and that his bail was fixed at $400. Randall asked him if it would not be better for him to enlist. Witness said he had not made up his mind to, yet. Randall said he had better enlist in navy, as he would get good pay, State aid, and a chance for prize-money. Two or three days after there was the same conversation, and Randall spoke to him several times about it. August 11, Randall called, and witness said he had made up his mind to go, and preferred the navy to the land service. Randall asked at what rate he wished to go, and witness answered as a coal-heaver, and said he would go for three years as a substitute, and asked Randall what he would give him, bailing him, and paying all the enlisting expenses. Randall said he would give him four hundred dollars, and witness told him he was satisfied with this. Witness was taken to police court, Aug. 16, in the forenoon, when he was bailed out by Randall and his father in $400. Afterwards witness went to Randall's office and saw Mr. Brown there; then went to provost marshal's office and rendezvous in the square, to be examined by the doctor; then back to Mr. Randall's office in the afternoon. Witness went to the navy-yard next morning, when Randall gave him ten dollars, saying he had not yet received any money of Brown. Witness said, that on board the receiving ship, Randall said he would come in a few days and settle with him. This Randall did not do; said he was busy. This was in August. Afterwards Randall came on board several times, but was always on other business. Witness was drafted to go away, but a letter was presented to Capt. Green, who had him detained. Did not remember of signing any agreement in Randall's office, witnessed by C. L. Randall, after being out on bail and before enlisting. Had signed order to Mr. Quinn upon Mr. Randall for $100, and have received $400 in all. $290 being sent through sheriff Clark, on Sept. 20, 1864.

John S. Hunt testified that he called Randall's attention to Leighton's letter to Capt. Green at a political meeting in Faneuil Hall on evening of Sept. 6, which letter had been placed in his hands to show Mr. Randall. Randall glanced it over and said all was
56 agreed to; asked him if he was sure; he said yes, he had done as he had agreed; told him I should have to report to Major Clark about it. Randall said, very well, I know Major Clark. I will see him myself. He said he had a paper which would show how Leighton had agreed with him. Randall said he had paid every cent he had agreed to; asked Randall why he paid ten dollars, and he said he didn't want him to be without a cent, and so gave it to him as a present.

C. L. Randall testified he saw Leighton sign the following agreement, and witnessed Leighton's signature:

BOSTON, *Aug.* 16*th*, 1864.

I, Michal Leighton, do hereby agree with S. H. Randall to enlist as substitute for J. R. Brown, of Lowell, for the sum of $400, which shall be retained and kept by said Randall without any claim here-

after to be made by me, to indemnify and save him harmless from the liability assumed by him in becoming surety for my appearance at the September term of the Superior Court; and I do also pay him said amount of $400, in consideration of his furnishing bail for me; and I further agree to acknowledge the receipt of four hundred dollars before the recruiting officers upon my enlistment.

his
MICHAEL + LEIGHTON.
mark

Witness, C. L. RANDALL.

That S. H. Randall, on returning from the rendezvous with Leighton, to S H. Randall's office, told Leighton that he must have something to show the officer on board the "Ohio" how Leighton had agreed, and asked him if he would sign an agreement; that Leighton told him to write out an agreement, and he would sign it; that it was written and read fully to Leighton, who said it was right, and that he would sign it; which he did, and I witnessed it. My brother told Leighton he took this so as to show the officer, so that he would not exact $400 of him when Leighton went on board, for he did not want to run any risk about the enlistement not being finished. He told Leighton that as soon as the government discharged the bail, he should have $400; that he would do his best to get the bail released, and that Leighton must wait until the case came up in court. Leighton said he was satisfied at being bailed out, if he never received a cent; and that he never could pay Mr. Randall for his kindness; if it was a thousand dollars he was to receive, he was welcome to it. He said he was willing to trust every thing to my brother, who had run the risk to bail him when no one of his friends would, and he knew he, my brother, run some risk with the brokers.

S. H. Randall testified that he was visiting the jail, and heard some one, who proved to be Leighton, speak to him while passing by his cell; that he went to his cell, and Leighton said he wanted to get out; said he was in for taking some money; that, when he was before the Police Court, something was said to him about enlisting, and that the more he thought of it, he believed it was better to go into the service than wait for a trial, or run the risk of conviction. Witness told Leighton that in small cases where satisfaction was acknowledged and restitution made, parties were sometimes allowed to enlist, and if any indictment was found, the same placed on
57 file by the district attorney; but that if he was bailed, he could do as he pleased, but the bail would be liable, if he did not appear. Leighton asked witness if he could not get him bailed out, saying he would rather pay a thousand dollars than stay there; that he would rather be in the navy a year than in jail a week; and that if witness would go his bail and pay Quinn he might keep the rest for his trouble. Witness told him he would be obliged to have it done through brokers, which would facilitate matters. Witness then called upon Judge French, told him Leighton wanted him to bail him, and Judge French said, if the complainant acknowledged satis-

faction, the matter could be adjusted; but he could do nothing until after the case came before grand jury or the Superior Court, when, if Quinn did not wish to prosecute, or wrote to have the prosecution discontinued, perhaps no bill would be found, and if one was, he could place the same on file upon proof of enlistment, and acknowledgment of satisfaction by Quinn. Leighton was bailed out by witness's father and himself, witness agreeing to give his co-surety fifty dollars for his trouble. After Leighton left the Police Court, he came to my office, where he saw Mr. Brown, and told him he would enlist for him. The two brokers were also present, and one or two of my brothers, and my father. Leighton went to the provost marshal's office and to the rendezvous, in North Square; and on our return, I told him, when parties went on board the receiving ship, they asked every man how much money he was promised, and if he was satisfied; and that I wanted an agreement to show I was not to pay him any thing, but had become his bail, and that he left the amount of the same to indemnify the bail against the claim by the government, and also, so that I should have something to protect me against any claim by him; for I might be disappointed in getting any thing of the brokers; it was considerable of a risk to run. He said, I promised, if you would get me bailed out, I would enlist, and I don't care how much money is paid, I shall never be able to repay you for this kindness. I told him Mr. Brown would pay the brokers, and I must look to them. If every thing resulted as I hoped, I would give him $400, if bail was not called upon, and I couldn't tell as to this, until after the grand jury had reported. He said he was satisfied. I wrote the agreement, read it to him; he took and read himself, as I thought, then signed it; and I asked my brother to witness it, which he did. He said he could trust me, as I had run the risk of bailing him out, which none of his friend would do.

The next day Leighton went with me to the receiving ship "Ohio," and while passing through the navy-yard, Leighton said to me, you are going to receive $700 or $800, there are some little things a man wants. I replied certainly, whatever you ask. Leighton said there was another thing; he would have Quinn paid. I replied this was no more than right; if I receive the money of the brokers, I will pay Quinn one hundred dollars upon Leighton's order, without regard to the bail's being discharged or not; but if I paid it, and the bail was discharged, it must be as a part of $400 he was to receive. Leighton said, you will do better by me than I asked, and more than I agreed to do for him when he was in jail, as Leighton then agreed to enlist upon being bailed, without regard whether the bail $400 should ever be claimed of me or not. I then give him ten dollars, all the money I had with me, and told him, when the bail was released, I would settle with him. I saw him several times on board the ship "Ohio," but told him I was not ready, as the government had not dis-
58 charged the bail; told him I had paid Quinn's counsel $100 on an order which Quinn had brought me from Leigton. He said this was right; he was satisfied though he never received any more. This is a copy of Leighton's order to Quinn upon me:

"Be it known that I, Michael Leighton, of Boston, in the county of Suffolk, and Commonwealth of Massachusetts, now in the United States naval service, on board the U. S. receiving ship "Ohio," do hereby transfer, make over, and assign to John Quinn, of said Boston, laborer, the sum of one hundred dollars out of the amount of money due to, and belonging, or credited to me in the hands of Capt. W. Greene Howe, provost marshal of the board of enrollment of the fourth Congressional district of Massachusetts, and also in the hands of S. H. Randall, esq., of said Boston, counsellor-at-law, to have and to hold said sum of one hundred dollars to said Quinn, his legal representatives and assigns forever.

Charlestown, Aug. 22, 1864.

[L. S. "MICHAEL his + mark QUINN."

Witness: C. W. DILLOWAY.

After the money was paid, Mr. Quinn, voluntarily, and without solicitation on my part, wrote his letter to the district attorneys, although I did ask that a receipt for the $100 should be given to show that Mr. Leighton had paid this indebtedness. I took this letter and receipt to Judge French, who said he would lay them before the grand jury.

I met Mr. Hunt at Faneuil Hall and had a few moments conversation with him; he said he had a letter from one Leighton to Capt. Green, complaining I had promised him $400, and had not paid him. I told him, I didn't consider I owed Leighton a cent; that I had done all I agreed; that I had Leighton's agreement that he had freely signed; that he had told the officers on the receiving ship that I was his bail then for $400, which was undischarged; and that, as the matter then stood, I intended to keep all I then had; for if I paid Leighton $400, and the bail $400, and Quinn $100, and the recruiting expenses $125, I should have lost money and made nothing. That I always did as I agreed, and that I would do so if it took the last drop of my blood. He said he should lay the matter before Major Clarke, and I told him I knew him well, and could satisfy him I had done just as I agreed.

I afterwards saw Leighton at the ship and complained of his conduct and his haste before the bail was discharged; told him I suspected that some one had put him up to do as he had done. He told me that Rogers, the policeman, had seen him, and that he would fix it.

I did not act as Leighton's counsel in this matter. I did what I did, as an outside matter, in no way in any professional relation; and in fact there was no professional labor to perform, for I knew that Leighton being enlisted upon the understanding I had with the district attorney, there was really nothing for me to do as counsel. I never intended nor undertook to act as his counsel. I intended only to bail him out, and make what I could by so doing; and then if I could get the government to discharge the bail, I was willing Leigh-

ton should receive it; and the very afternoon that Judge French did in writing discharge the bail, I sent to Leighton $290, which, with what he had already paid to him, made up the amount of
59 $400, which he claimed I had promised to him. And this amount of $400 had been all paid before this inquiry was begun by the court. I kept all my promises, and did just as I had agreed with Leighton; and he nor any one else have any just cause of complaint against me.

Upon the foregoing facts, the court ruled that said Randall violated his oath of office as an attorney-at-law, and was guilty of malpractice and gross misconduct in his said office, and that the judgment and order of the court be, that he be removed from the office of an attorney-at-law within this Commonwealth.

To all of which rulings said Randall excepts, and prays that his bill of exceptions may be allowed.

SAMUEL H. RANDALL.

OCTOBER 24, 1864.

The foregoing exceptions are not allowed; the matter to which they relate not being, in my judgment, matter of exception or appeal.

LINCOLN F. BRIGHAM,
Justice of Superior Court.

The following appears on the back of the original bill of exceptions:

"In the matter of S. H. Randall, attorney-at-law. Bill of exceptions. Exceptions filed October term. Not allowed. H. Homer, clerk, pro tem."

I, Samuel H. Randall, of Boston, do depose, testify, and say, that the bill of exceptions tendered by me to Judge Brigham, is a true and fair report of the proceedings and evidence elicited at hearing, 21st September, 1864.

SAMUEL H. RANDALL.

Sworn to March 1, 1865.

Copy.—Attest: GEO. W. NICHOLS,
Ass't Clerk.

60 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY,
Clerk's Office of said Court.

I hereby certify the petition of Samuel H. Randall for certiorari was heard upon argument before the Supreme Judicial Court for the commonwealth at the January term, 1865, thereof, and that at said January term the following rescript containing the opinion of the court and given by Hon. George T. Bigelow, chief justice, was directed to be entered:

Supreme Judicial Court, for the commonwealth. At Boston, January term, 1865.

COMMONWEALTH OF MASSACHUSETTS:

"In the case of Samuel H. Randall, pet'nr, pending in the Supreme Judicial Court for the county of Suffolk ordered, 'that the clerk of said court in said county, make the following entry, under said case, in the docket of said court, viz: petition dismissed. By the court.'

CRES. C. WILDE, *Clerk.*

Brief statement of the grounds and reason of the decision.s. Certiorari will not lie to correct the errors of the Superior Court in a proceeding such as is set forth in the petition.

61 "The subject matter of that proceeding was within the jurisdiction of the Superior Court. If a petition, complaint, written notice, or other process was necessary to the legality or validity of the proceedings, the omission of any allegations or charge in writing against the petitioner was only a defect or informality in the proceedings of which the court had full jurisdiction and cognizance.

"The Superior Court is a court of common law, and in a proceeding for the removal of an attorney for malpractice and misconduct, it acts, according to the course of the common law, upon a matter within its jurisdiction. Certiorari will not lie to correct errors in such a proceeding."

In witness whereof, I have hereto set my hand and affixed the seal of said court this ninth day of April, eighteen hundred and sixty-six.

[L. S.] GEO. C. WILDE, *Clerk.*

[5-c int. rev. stamp cancelled.]

62 *A.*

Paper annexed to bill of exceptions.

Supreme Judicial Court.—April term, 1865.

63 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

To the honorable the Justices of the Supreme Judicial Court within and for said county of Suffolk:

Respectfully represents your petitioner, Samuel H. Randall, of Boston, that at the Supreme Judicial Court, begun and holden at Boston, within and for said county of Suffolk, on the first Tuesday of April, A. D. 1860, your petitioner was duly admitted to practise as an attorney, and by virtue thereof, as a counsellor-at-law in all of the courts of said commonwealth, as by the record thereof, now remaining in the clerk's office of said court, will more fully appear; that your petitioner's name is still upon said records; that he has never resigned his said office, and knows of no legal cause why he should not be permitted fully to enjoy all the rights and privileges of same, in all of the courts of the commonwealth.

And your petitioner further represents, that denial of his right to-

practise as an attorney in the Superior Court within and for the county of Suffolk, is now made by the justices of said court, although your petitioner knows of no legal cause therefor. Wherefore your petitioner prays that a writ of madamus may be issued to the justices of said Superior Court, commanding them to admit your petitioner to the practice of his office of attorney in said Superior Court, or to show cause why petitioner should be excluded from the enjoyment of the same.

April 7, 1865.

SAMUEL H. RANDALL.

[50-ct stamp]

SUFFOLK, *ss:*

Personally appeared the above-named Samuel H. Randall, and made oath to the truth of the foregoing declarations by him subscribed before me.

GEO. W. PHILLIPS, *Justice of the Peace.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

To the honorable the Justices of the Superior Court of said commonwealth of Massachusetts, greeting:

Whereas, we have been given to understand in our Supreme Judicial Court, now holden at Boston, within and for our county of Suffolk, by the petition of Samuel H. Randall, of Boston, in said county of Suffolk, that at the Supreme Judicial Court, begun and
64 holden at Boston, within and for said county of Suffolk, on the first Tuesday of April, A. D. 1860, said petitioner was duly admitted to practice as an attorney, and by virtue thereof, as a counsellor-at-law, in all of the courts of said commonwealth, as by the record thereof, now remaining in the clerk's office of said court, will more fully appear. That said petitioner's name is still upon said records; that he has never resigned his said office, and knows of no legal cause why he should not be permitted fully to enjoy all the rights and privileges of same in all of the courts of the commonwealth. And said petitioner further represents, that denial of his right to practise as an attorney in the Superior Court within and for the county of Suffolk is now made by the justices of said court, although said petitioner knows of no legal cause therefor. Of all which we have been informed by the complaint made to us in that behalf.

We, therefore, being willing that due and speedy justice should be done in this behalf, as it is reasonable, do command you that immediately, after the receipt of this our writ, you do, without delay, admit said Samuel H. Randall, the petitioner, to the practice of his office of attorney in said Superior Court, or that you show us cause to the contrary thereof, lest by your default the same complaint should be repeated to us.

And how you shall have executed this writ, make known to us in our Supreme Judicial Court to be holden at Boston, within and for

our county of Suffolk, on the second Tuesday of September next, by adjournment from the first Tuesday of April last, then returning to us this our writ.

Witness, George T. Bigelow, esquire, at Boston, the twentieth day of May, in the year of our Lord one thousand eight hundred and sixty-five.

[L. S.] GEO. C. WILDE, *Clerk.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss.*

BOSTON, *May* 25, 1865.

I hereby certify that the foregoing is a true copy of an original writ of mandamus, which I this day served by delivering said original writ of mandamus into the hands of the Honorable Lincoln F. Brigham, one of the justices of the Superior Court within and for the county of Suffolk, holding at time of said service a session of said Superior Court at Boston.

E. W. SANBORN, *Dep. Sheriff.*

In the matter of Samuel H. Randall, petitioner, &c., now pending in said court.

65 COMMONWEALTH OF MASSACHUSETTS:

To the honorable, the Justices of the Supreme Judicial Court, holden at Boston, in the county of Suffolk, by adjournment, on the second Tuesday of September, 1865:

The undersigned, Chief Justice of the Superior Court, in behalf thereof, herewith transmits to the Justices of the Supreme Judicial Court, a copy of the record of the proceedings of the said Superior Court, at the October term thereof, for criminal business, held by the Honorable Lincoln F. Brigham, a justice thereof, in Boston, in the year 1864, so far as the same discloses any proceedings of the said Superior Court, having any relation to the said petitioner, by which it appears that, by an adjudication of the said Superior Court, the said Samuel H. Randall was removed from the office of an attorney-at-law in the courts of this commonwealth for mal-practice and gross misconduct in his said office.

The Justices of the Superior Court have no further knowledge of the matters set forth in the petition aforesaid, than is contained in the copy aforesaid, of the said record, to which, therefore, they respectfully refer the Justices of the Supreme Judicial Court.

CHARLES ALLEN.

Copy of record.

COMMONWEALTH OF MASSACHUSETTS, SUFFOLK, *to wit:*

At the Superior Court, begun and holden at the city of Boston, within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of October in the year of our Lord one thousand eight hundred and sixty-four.

In the matter of Samuel H. Randall, an attorney-at-law, against whom charges of profesional misconduct and mal-practice have been made before this court, after a full hearing, the following facts have been found:

One Michael Leighton, on the 16th of August last, was confined in the jail at Boston, because of his failure to recognize, as ordered by the Police Court of Boston, in the sum of $400, to appear and answer in the Superior Court, at the following September term, to the finding of the grand jury upon the accusation of one John Rogers, that said Leighton had committed the crime of larceny by stealing United States Treasury notes of the value of $100, the property of John Quinn.

While thus confined, said Leighton (and whether this occurred upon his own solicitation, or upon the solicitation of said Randall, was the subject of contradictory evidence) employed said Randall to act as his counsel in the matter of said complaint; and said
66 Randall undertook so to do. Said Leighton declared his readiness to enlist either in the army or navy of the United States, if the prosecution of said complaint could be discharged upon his so doing; and said Randall, as said Leighton's counsel, applied to the assistant district attorney of the county of Suffolk for an agreement to dispose of said prosecution on these terms. This agreement the district attorney declined to make at that stage of the prosecution; but encouraged said Randall to expect that he would not oppose such an arangement in the Superior Court, if approved by the judge presiding there, when any indictment again said Leighton was presented.

Without any more definite arrangement with the district attorney, said Randall and his father became the sureties of said Leighton, upon his recognizance in the sum of $400, to appear in the Superior Court. Said Leighton proceeded immediately afterward to said Randall's office, where the following document was made; said Leighton not being able to read or write.

BOSTON, *Aug.* 16, 1864.

I, Michael Leighton, do hereby agree with S. H. Randall to enlist as substitute for J. R. Brown, of Lowell, for $400, which shall be retained and kept by said Randall, without any claim hereafter to be made by me, to indemnify and save him harmless from the liability assumed by him in becoming surety for my appearance at the September term of the Superior Court; and I do also pay him said amount of $400 in consideration of his furnishing bail for me; and I further agree to acknowledge the receipt of $400 before the recruiting officer upon my enlistment.

his
MICHAEL + LEIGHTON.
mark.

Witness: C. L. RANDALL.

On the same 16th day of August, said Leighton enlisted as landsman for three years in the naval service of the United States, as the

substitute of J. R. Brown, of Lowell, who paid to said Randall, in consideration of said enlistment, the sum of $830.

When, in pursuance of said enlistment, said Leighton went on board the receiving ship "Ohio," said Randall paid to him the sum of ten dollars.

John Quinn went on board the ship "Ohio" and procured from said Leighton the following order:

"Be it known that I, Michael his + mark. Leighton, of Boston, in the county of Suffolk, and Commonwealth of Massachusetts, now in the United States naval service, on board the U. S. receiving ship "Ohio," do hereby transfer, make over, and assign to John Quinn of said Boston, laborer, the sum of one hundred dollars, out of the amounts of money due to, and belonging to, or credited to, me in the hands of Capt. W. Green Howe, provost marshal of the board of enrollment of the fourth congressional district of Massachusetts, and also in the hands of S. H. Randall, esq., of said Boston, counsellor-at-law, to have and to hold the said sum of one hundred dollars to said Quinn, his legal representatives and assigns, forever.

CHARLESTOWN, *Aug.* 22.

[L. S.] "MICHAEL his + mark. LEIGHTON.

"MICHAEL his + mark. QUINN."

Witness: C. H. DILLOWAY, 1864.

67 Upon presentation of this document to said Randall, he prepared, and caused said Quinn to execute, the following documents, paying him at the same time the sum of $100.

BOSTON, *Aug.* 23, 1864.

Received of Michael Leighton one hundred dolllars, in full of all demands held be me against him to date, for money received by him from me.

JOHN QUINN.

BOSTON, *Aug.* 24, 1864.

To Hon. Judges SANGER and FRENCH, District Attorneys for County of Suffolk:

SIRS: Michael Leighton, who was arrested on complaint made to the Police Court for larceny of $100 from me, and who, having there waived an examination, was bound over to answer at this September term of the Superior Court for criminal business, has returned to me the sum of $100.

So far as I am concerned, I have no desire to prosecute him; and not knowing but he may have taken it for safe keeping and intended to return it to me, I recommend that the prosecution be discontinued, if in your own judgment it be proper.

Your respectfully,

JOHN QUINN.

On the evening of September 6, John S. Hunt, a police officer, presented to said Randall the following document:—

U. S. RECEIVING SHIP "OHIO," *Sept.* 6, 1864.

Capt. GREEN.

SIR: I enlisted in the naval service of the United States the 15th August, 1864, for which enlistment I was promised the sum of four hundred ($400) dollars by Samuel H. Randall, a lawyer occupying No. 3 room, Barristers' Hall, Boston. The only money, however, that I received was ten ($10) dollars, paid me by said Samuel H. Randall. I have seen Mr. Randall on board ship twice since I have been here; have asked him if he intended to settle with me for the balance, but have both times received evasive answers. I now appeal to you sir, as commander of this ship, to see that justice be done me, as I have a wife and two children, residents of Boston, who are dependent on me for support; and the money therefor, which this Randall has, but which rightfully belongs to me, would be gratefully acceptable for my family's support. I have been drafted for the East Gulf squadron, and would like to have this matter settled before leaving; and it occasions me much uneasiness.

With respect, your obedient servant,

MICHAEL LEIGHTON.

Before the delivery of this letter to said Randall, the following endorsements were made upon it:—

68 Will Mr. Randall give this his earliest attention, as the "Connecticut" sails to-morrow.

Respectfully,

C. GREEN,
Captain.

"OHIO," *Sept.* 6, 1864.

Please send a man in his place.

S. H. STRINGHAM.
Commandant.

Upon reading this letter and its indorsements, said Randall replied that he had paid Leighton all he had agreed to, and should not pay him another cent.

An appplication was also made to said Randall, by the wife of Michael Leighton, for a portion of what she claimed to be her husband's bounty in the hands of Randall. In application she stated to him that the destitution of herself and of her two children was such that she should be obliged to give them up to the city; to which statement he replied by advising her to do so, and gave her no money.

An indictment against Michael Leighton for the larceny of John Quinn's property was presented in the Superior Court on Sept. 12, and on the 16th September he was called to plead to said indictment; and the attention of the court was directed to the foregoing facts, by the grand jury, and said Randall notified that upon the following

Wednesday, Sept. 21, the matter of his professional conduct and standing at the bar would be considered.

At the hearing, which took place on said Sept. 21, said Randall exhibited the following letters:—

Sept. 20. 1864.

M. RANDALL.

The government will make no claim against you or your co-security as bail in the case Commonwealth *vs.* M. Leighton.

HENRY F. FRENCH,
Assistant District Attorney.

Sept. 20, 1864.

Mr. M. LEIGHTON.

SIR: The government having this day relinquished any claim against the two securities who were bail in your case for $400, I take pleasure in enclosing you the amount which the government might otherwise have claimed, and which the sureties expected to pay, less the amount of $100 already paid by me, on your order, to Mr. Quinn, and the ten dollars cash recived by you, making $400 in all.

Yours truly,

S. H. RANDALL.

Said Leighton claimed that his contract with said Randall was, that in consideration of said Randall's paying to him the sum of $400, and procuring the discharge of the prosecution against him, for larceny, he, said Leighton, would enlist as a substitute in the army or navy, and said Randall should receive all of the avails of said enlistment.

Said Randall claimed that his contract with said Leighton was, that in consideration of said Leighton's enlisting as a substitute in the army or navy of the United States, and allowing said Randall to receive and have all of the avails of said enlistment, he, said Randall, would procure his discharge from the prosecution for larceny. And said Randall claimed that he assured said Leighton, orally, that if he was not obliged to pay the sum for which he had recognized; he would pay the whole or a part of the same to him. As evidence of what the contract was, said Randall exhibited and relied upon the writing signed by said Leighton.

69

Said Leighton, when confined in jail, had no desire or intention to enter into the war service of the United States until said Randall proposed to him to do so, as a means of avoiding the prosecution of said complaint for larceny.

Said Leighton had the belief that said Randall, as an attorney-at-law, and as counsel, could, and would, procure his discharge from said prosecution. Induced by this belief, his desire to be released from confinement in jail, and his fear of ultimate conviction and punishment upon said complaint, he entered into a contract with said Randall to enlist as a substitute in the army or navy of the United

States for the term of three years; said Randall—as said Leighton states the contract,—to receive all the money which should be procured by means of said enlistment, excepting the sum of $400, which was to be paid to said Leighton; or said Randall, as he states the contract, and exhibits it in writing, to receive all the money which should be procured by means of said enlistment.

Said Randall intentionally and knowingly gave said Leighton just cause of this belief, and availed himself of it to obtain from him a contract, which, on the part of any person contracting with him, in such a matter, under the circumstances which beset him, would have been unconscionable and extortionate; and which, on the part of an attorney-at-law, dealing with a client who was ignorant, incapable, and fearful, and who confided in him as his counsel, as a man in that condition would be likely to do, was not only unconscionable and extortious, but grossly unprofessional and a violation of law.

Irrespective of the lawfulness or propriety of said contract, it may be further said that its operation was almost wholly injurious to said Leighton. In compliance with it, he has entered the naval service of the United States so as to expose himself to the toil and hazard of a terrible war for the term of three years, in consideration of which his counsel has received the sum of $830, of which money, until after the attention of this court was directed to the matter by the grand jury, and it was publicly noticed, said Leighton has received only ten dollars. Moreover, notwithstanding said Leighton's entire compliance with his contract, he has not been discharged from the prosecution of the complaint for larceny, the avoidance of which was the sole moving cause in his mind of making the contract. For, according to said Randall's statement and exhibition in writing of the contract, said Leighton neither stipulated for, nor expected to receive, any money, as a condition of his enlistment, and the payment of ten dollars to him was an act purely of personal kindness by said Randall.

The services of said Randall to said Leighton, in compliance with said contract and his relation to him as counsel, consisted of an unsuccessful solicitation to the assistant district attorney for his consent to the discharge of said prosecution upon said Leighton's enlistment. The reply to that solicitation did not warrant the assumption of such consent at a future time, upon which said Leighton or said Randall could safely rely and proceed in the enlistment. Yet immediately after the failure to procure this consent, said Randall caused said Leighton to be enlisted, as if the discharge sought had been procured, and it is inferred that said Leighton submitted to the enlistment under the influence of a belief that such was the fact. The second service rendered by said Randall to said Leighton, was the payment of $100 to John Quinn. This payment had no legal tendency to procure said Leighton's discharge and did not so operate, as the prosecution afterwards proceeded to indictment, not probably without the co-operation and evidence of said Quinn. This payment appears, by the documents which furnish the only evidence of it, to have been a transaction of an unusual and

equivocal character. From one point of view, it has the aspect of a restitution to said Quinn by Leighton, through said Randall, of stolen property. It has also an aspect which excites reasonable suspicion of an intent by the parties to it, to compound a felony. The third service rendered by said Randall to said Leighton, was to become his surety, in violation of the rules of this court, and obtain his father as a co-surety upon said Leighton's recognizance to appear in this court. This service enabled said Leighton to be enlisted, and the enlistment was very likely to place him where the process of the commonwealth could not arrest him, and so indirectly and uncertainly operated to postpone, and perhaps ultimately to defeat the prosecution. It did not otherwise tend to discharge the prosecution, and it does not appear that said Leighton made this contract because he desired, expected, supposed said Randall as his counsel would serve him, by enabling him to become a fugitive from justice.

These three are all the services rendered by said Randall to said Leighton, in compliance with said contract and his relation to him as his counsel, prior to the time when he replied to said Leighton's claim for a settlement, "that he had done all he had agreed to," which was on Sept. 6, when he had been compensated for said services in the sum of $720.

The payment by said Randall to said Leighton of the sum of $290, between the time when said Randall was notified of the charges made against him in this court, and the time appointed for their investigation, although it tended to alleviate the hardships of said Leighton's position under said contract, furnishes no controlling consideration in determining the character of said contract and said Randall's conduct under it.

Upon the foregoing facts, the court find that said Samuel H. Randall, in the making of said contract, in his acts in pursuance of it, and in his relations to said Leighton as his client, and affecting his interests, violated his oath of office as an attorney-at-law, and was guilty of mal-practice and gross misconduct in his said office; and the judgment and order of the court is, that for these causes he be removed from the office of an attorney-at-law within this commonwealth.

LINCOLN F. BRIGHAM,
Justice of Superior Court.

71 Supreme Judicial Court.

Petitioner's demurrer to return.

S. H. RANDALL, petitioner,
vs.
JUSTICES OF SUPERIOR COURT.

SUFFOLK, *ss* :

And now comes the petitioner, and demurs to the return filed by the justices of the Superior Court in answer to the alternative writ of mandamus, and says that said return is insufficient in law, as an answer to said writ. And for cause assigns the following reasons:

First. That it nowhere appears in said return there was any charge, specific or general, of any act of mal-practice and gross misconduct by the petitioner, contained or referred to in any petition, complaint, or other proceeding, filed of record in said Superior Court against the petitioner as an attorney-at-law, as is required by law, and the practice and usage of said Superior Court in proceedings for the removal of attorneys.

Second. That said return does not disclose the fact that said Superior Court had any lawful jurisdiction over the person of the petitioner, as an attorney-at-law, by the service and return of record of any summons, order of notice, or other process of said court, notifying the petitioner to appear before said court, at a day certain, to answer charges that had been preferred against him.

Third. That no legal cause, on the merits, is disclosed by said return, warranting petitioner's removal from his office of attorney.

Fourth. That said return contains no legal record of petitioner's removal from his office of attorney-at-law.

Fifth. That said return is so general, uncertain, and indefinite, as to be invalid in law, as a sufficient return to the writ of mandamus.

SAMUEL H. RANDALL.

I hereby certify that I am of opinion that there is such probable ground in law for this demurrer, as to make it a fit subject of judicial inquiry and trial, and that it is not intended merely for delay.

H. W. PAINE, *of Counsel for Petitioner.*

Filed Oct. 12, 1865.

Supreme Judicial Court, October Term, 1865.

SUFFOLK, *ss*:

This case is reserved for the consideration of the whole court on the petition and writ, the return thereto, and the demurrer to said return, filed by the petitioner.

G. T. BIGELOW, *Chief Justice.*

A true copy.
Attest:
GEO. W. NICHOLS, *Ass't Clerk.*

B.

72 Supreme Judicial Court for Suffolk County, April Term, 1866.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss*:

CLERK'S OFFICE OF SAID COURT.

I hereby certify the petition of Samuel H. Randall for a writ of mandamus was heard upon argument before the Supreme Judicial Court for the commonwealth at the January term, 1865, to wit, in November, 1865; and that, at the January term of said court, A. D.

1866, the following rescript, containing the opinion of the court, and given by Hon. George T. Bigelow, chief justice, was directed to be entered:

Supreme Judicial Court for the Commonwealth, January Term, 1866.

COMMONWEALTH OF MASSACHUSETTS, *ss*:

AT BOSTON.

In the case of Samuel H. Randall, pet'n'r for mandamus, now pending in the Supreme Judicial Court for the County of Suffolk, ordered, that the clerk of said court, in said county, make the following entry, under said case, in the docket of said court, viz: Peremptory mandamus denied.

By the Court:

GEO. C. WILDE, *Clerk.*

March 17, 1866.

73 *Brief statement of the grounds and reasons of the decision.*

1. The removal of an attorney by the Superior Court for the causes set forth in the record, returned to this court, is a civil, and not a criminal, proceeding, and no constitutional right was violated by the omission to file a full statement, or any specification of the charges on which said removal was founded.

2. The appearance of the petitioner before the Superior Court without a formal notice, and the hearing had before the court, in which no objection was made by the petitioner to the regularity of the proceedings, or to the want of any statement or specification of the charges against the petitioner, was a waiver by him of every objection to the validity of the proceedings founded on such omissions or defects.

In witness whereof, I have hereto set my hand and affixed
74 the seal of said court this ninth day of April, eighteen hundred and sixty-six.

[L. S] GEO. C. WILDE, *Clerk.*

[5-ct int. rev. stamp, cancelled.]

75 Endorsed: No. 345. In the matter of Samuel H. Randall, petitioner for mandamus. Record. Suffolk county. U. S. C. C., Mass. dist. Samuel H. Randall *vs.* Lincoln F. Brigham. Paper annexed to bill exceptions.

C.

76 *Laws read as evidence to Court.*

"Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws."—*Art.* 10, *bill of rights constitution, Mass.*

"Every subject of the commonwealth ought to find a certain remedy by having recourse to the laws for all injuries or wrongs which he may receive in his person, property, or character; he ought to obtain right and justice freely, without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."—*Art.* 11.

"No subject shall be held to answer for any crime or offence until the same is fully and plainly, substantially, and formally, described to him. And no subject shall be despoiled or deprived if his property, immunities or privileges, put out of the protection of the law, or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land."—*Article* 12.

77 "The people have a right to require of their law-givers and magistrates an exact and constant observance of the fundamental principles of the constitution, in the formation and execution of the laws necessary for the good administration of the commonwealth."—*Article* 18.

"It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit."—*Article 29th.*

"Every person chosen or commissioned to any judicial office under the government shall, before he enters on the discharge of the business of his place or office, take and subscribe the following oath or affirmation, viz: "I, ——— A. B., do solemnly swear and affirm, that I will faithfully and impartially discharge and perform all the 78 duties incumbent on me as ——————— according to the best of my abilities and understanding, agreeably to the rules and regulations of the constitution and the laws of the commonwealth. So help me God."—*Chap.* 6, *Const. of Mass., Sec.* 1.

"All the laws which have heretofore been adopted, use and approved in the province, colony, or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force until altered or appealed by the legislature, such ports only excepted as are repugnant to the rights and liberties contained in this constitution."—*Chap.* 6 *Const. Mass., Sec.* 6.

"A person admitted in any court may practice in every other court of the State."—*Genl. Statutes Mass. Chap.* 121, *Sec.* 32.

"An attorney may be removed by the Supreme Judicial Court or Superior Court for any deceit, malpractice or other gross misconduct, and the expenses and costs of the inquiry and proceedings in any court for the removal of an attorney, shall be paid as in criminal prosecutions in the same courts."—*Chap.* 121, *Genl. Stat. Mass., Sec.* 34.

79 *Chap.* 158 *of Genl. Statutes Mass.*—Title. "Of the rights of persons accused."

Sec. 8.—"No person shall be punished for an offence unless duly and legally convicted thereof, in a court having competent jurisdiction of the cause and of the person."

"In all cases, civil or criminal, whether according to the course of the common law or otherwise, a party aggrieved by an opinion, ruling, direction, or judgment of the court, in matter of law, may allege exceptions thereto. The exceptions being examined and found conformable to the truth, shall be allowed by the presiding judge."—*Chap.* 115, *Sec.* 7, *Genl. Statutes.*

The Superior Court shall be held in every year for the county of Suffolk, at Boston, for civil business on the first Tuesdays of January, April, July and October, for criminal business on the first Monday of every month.

In the counties where both civil and criminal terms are established, civil business exclusively shall be transacted at civil terms,
80 and criminal business at criminal terms, and continuances of civil and criminal cases shall be to civil and criminal terms respectively without any special order therefor. *Genl. Statutes Mass.*, *Chap.* 114, *Sec.* 16–17.

U. S. C. C. Mass. District. Samuel H. Randall *vs.* Lincoln F. Brigham. Paper annexed to bill exceptions.

81 THE UNITED STATES OF AMERICA, *ss:*

To LINCOLN F. BRIGHAM, Esquire, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, district of Massachusetts, wherein Samuel H. Randall is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Nathan Clifford, Justice of the Supreme Court of the United States, this 25th day of October, in the year of our Lord one thousand eight hundred and sixty-seven.

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

82 STATE AND DISTRICT OF MASSACHUSETTS:

I. William C. Martin, of Boston, in the county of Suffolk, and State of Massachusetts, deputy sheriff, do hereby depose, testify, and say, that on this twenty-sixth day of October, A. D. one thousand eight hundred and sixty-seven, I made due service of the within citation, by delivering a true copy of the within original into the hands of Lincoln F. Brigham, esquire, the defendant in error, at his office in the court-house in Boston.

WM. D. MARTIN,
Deputy Sheriff.

CLERK'S OFFICE OF THE UNITED STATES CIRCUIT COURT,
For the District of Massachusetts, ss:
AT BOSTON.

On the thirteenth day of October, A. D. one thousand eight hundred and sixty-seven, personally appeared the above-named William D. Martin, who being by me duly sworn, made oath to the truth of the foregoing declaration by him subscribed. Before me.

JOHN G. STETSON,
Clerk U. S. C. C.

83 Know all men by these presents, that we, Samuel H. Randall, of the State, county, and city of New York, as principal, and Henry Randall, of the city of Boston, in the State of Massachusetts, as surety, are held and firmly bound unto Lincoln F. Brigham, of said Boston, in the full and just sum of five hundred dollars, to be paid to the said Lincoln F. Brigham, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by those presents. Sealed with our seals and dated this twenty-fifth day of October, in the year of our Lord one thousand eight hundred and sixty-seven.

Whereas lately, to wit, at the October term, A. D. 1867, of the United States Circuit Court for the district of Massachusetts, at Boston, in a suit depending in said court between Samuel H. Randall, plaintiff, and Lincoln F. Brigham, defendant, judgment was rendered against the said Samuel H. Randall; and the said Samuel H. Randall, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Lincoln F. Brigham, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next. Now the condition of the above obligation is such, that if the said Samuel H. Randall shall prosecute said writ of error to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] SAMUEL H. RANDALL.
[SEAL.] HENRY RANDALL.

Sealed and delivered in presence of—
ARGENTINE JONES.

Approved by

NATHAN CLIFFORD,
Asso. Jus. Sup. Courte U. S.

A true copy.
Att.: JOHN G. STETSON, *Clerk.*

Endorsed: Randall *vs.* Brigham. Copy of Bond.

84 Supreme Court of the United States.

SAMUEL H. RANDALL
vs.
LINCOLN F. BRIGHAM. } In error.

Of December term, in the year of our Lord one thousand eight hundred and sixty-seven.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Samuel H. Randall, in his own person, and says, that in the record and proceedings aforesaid there is manifest error in this, to wit: that by the record aforesaid it appears "the court instructed the jury, that upon the plaintiff's evidence the action in judgment of law cannot be maintained, and that their verdict should be for the defendant," which instruction, this plaintiff in error says, is erroneous, and because, by the record aforesaid, it appears that the judgment aforesaid given, was given for the said Lincoln F. Brigham, against the said Samuel H. Randall, whereas, by the law of the land, the said judgment ought to have been given for the said Samuel H. Randall against the said Lincoln F. Brigham. And the said Samuel H. Randall prays, that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, and that such other order or judgment may be made in the premises as law and justice require.

SAMUEL H. RANDALL,
Plaintiff in error.

REC. 290—4

Supreme Court of the United States.

No. 141.

SAMUEL H. RANDALL,

PLAINTIFF IN ERROR,

vs.

LINCOLN F. BRIGHAM.

BRIEF FOR THE DEFENDANT.

CHARLES ALLEN,

For the Defendant.

Wright & Potter, Printers, Cor. Milk and Federal Sts.

Supreme Court of the United States.

No. 141.

SAMUEL H. RANDALL,

PLAINTIFF IN ERROR,

vs.

LINCOLN F. BRIGHAM.

BRIEF FOR THE DEFENDANT.

THIS ACTION was brought by the plaintiff in error, who was formerly an attorney and counsellor at law of Massachusetts, against the defendant, one of the Justices of the Superior Court of that state, charging the latter with having wrongfully removed the plaintiff from the bar. Upon the plaintiff's evidence, the court instructed the jury that the action could not be maintained, and a verdict was accordingly rendered for the defendant, without the introduction of any evidence on his part.

The substantial facts and circumstances, taking as true the evidence introduced by the plaintiff, were as follows: —

During an investigation before the grand jury attending upon the Superior Court, a letter was produced from a sailor who had enlisted in the navy, addressed to his captain, making certain charges against the plaintiff. The foreman of the grand jury requested the prosecuting officer to bring this letter to the attention of the court. This was done, Mr. Justice Brigham then sitting as presiding justice. He sent for the plaintiff, and in open court called the plaintiff's attention to the letter, and informed him that he (the justice) would inquire

into the plaintiff's professional character and standing at the bar on a certain day named, which was several days thereafter. When that day arrived, the plaintiff was again sent for, and a hearing was had upon the subject of the complaint contained in the sailor's letter: the prosecuting officer putting in evidence, both oral and documentary, against the plaintiff; and the plaintiff testifying in his own behalf, and introducing other evidence, both oral and documentary. [See Transcript of Record, pages 24, for letter; and 9, 12, 28–34.] This hearing was on Sept. 21, 1864; and on Oct. 10th, the defendant delivered to the clerk of the court his judgment in writing, accompanied by a statement of his reasons, removing the plaintiff from the bar, for a violation of his oath, and malpractice, and gross misconduct.

The legal ground of complaint alleged by the plaintiff is, that there was no legal process against him of any kind, and that without such process the order for his removal from the bar was a mere usurpation, the defendant having no jurisdiction.

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The General Statutes of Massachusetts, *c.* 121, § 34, provide that "an attorney may be removed by the Supreme Judicial Court or Superior Court for any deceit, malpractice, or other gross misconduct." By § 32 of the same chapter, "a person admitted in any court may practise in every other court in the state; and there shall be no distinction of counsellors and attorneys." Various other provisions respecting attorneys are contained in the same chapter, § § 28–40.

The Superior Court of Massachusetts is also a court of general jurisdiction. *Randall*, pet'r, 11 Allen, 472. Indeed, its jurisdiction is the most general of any court in Massachusetts; see Gen. Sts. *c.* 114.

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I. Both the admission and removal of attorneys are judicial acts. This doctrine has been settled in this court, and is no longer open to debate.

In a recent case, where an attorney was removed in Minnesota, without any previous notice at all to him, either formal or actual, that the court intended to proceed against him, and

where he had no opportunity to be heard in his defence, and a *mandamus* was sought in this court to restore him, Chief Justice Taney, in delivering the unanimous opinion of the court, said: "Now in proceeding to remove the relator, the court was necessarily called on to decide whether, in a case where the offence was committed in open court, and the proceeding was had by the court on its own motion, the statute of Minnesota required that notice should be given to the party, and an opportunity afforded him to be heard in his defence. The court, it seems, were of opinion that no notice was necessary, and proceeded without it; and, whether this decision was erroneous or not, yet it was made in the exercise of judicial authority, *where the subject matter was within their jurisdiction*, and it cannot therefore be revised and annulled in this form of proceeding." *Exparte Secombe*, 19 How. 9, 15.

This doctrine was also recognized and affirmed in *Exparte Garland*, 4 Wallace, 378, 379. See, also, *In re Cooper*, 22 N. Y. 85.

II. By the express provision of the Gen. Sts. of Mass. *c.* 121, § 34, (already quoted,) as well as by the rules and practice of all common law courts, the Superior Court has jurisdiction to determine who is qualified to become, or to continue, one of its officers as an attorney and counsellor of the court.

III. It is a general principle, applicable to all magistrates, even to those of inferior jurisdiction, that they are not liable to an action for any judicial act done within their jurisdiction.

In reference to inferior magistrates, it has been said that they are only protected while they act within their jurisdiction. *Pratt* v. *Gardner*, 2 Cush. 63. *Chickering* v. *Robinson*, 3 Cush. 543. *Piper* v. *Pearson*, 2 Gray, 120. *Clark* v. *May*, Ib. 411.

But in reference to judges of courts of general jurisdiction, the rule is not thus limited. Such judges are not liable to actions for their judicial acts, whether within or without their jurisdiction.

1. The extent of a judge's jurisdiction is often the very

question which he is called on judicially to determine. To decide upon this question is as much a judicial decision as any other. And the question may be a difficult and doubtful one. Yet he is bound to decide, and to decide according to his judgment. But shall he decide in fear or peril of a lawsuit?

2. The reason applicable to inferior magistrates does not apply. It has been supposed that such magistrates may be inclined to assume jurisdiction wrongfully, and therefore the law has imposed a check upon them. This is the more reasonable because their decision, one way or the other, will not be of material importance. But with higher tribunals it is otherwise. There must be some point in the administration of the law where unqualified confidence is to be reposed and acknowledged. There must be some ultimate repository of justice, so far as individuals are concerned. In England, the king's judges occupy this position; the judges of courts of general jurisdiction. To them is delegated the whole judicial power of the sovereign; and they are responsible to the sovereign alone. See *Taafe* v. *Downes*, in note, 3 Moore P. C. 41. As long ago as 1608, in *Floyd & Barker's* case, 12 Co. 23, it was said: "The reason and cause why a judge, for anything done by him as judge, by the authority which the king hath committed to him, and as sitting in the seat of the king (concerning his justice) shall not be drawn in question before any other judge, for any surmise of corruption, except before the king himself, is for this; the king himself is *de jure* to deliver justice to all his subjects; and for this, that he himself cannot do it to all persons, he delegates his power to his judges, who have the custody and guard of the king's oath. And forasmuch as this concerns the honor and conscience of the king, there is great reason that the king himself shall take account of it, *and no other*."

This general doctrine is especially applicable in America, where, by our national and state constitutions, judicial power is vested exclusively in the courts. It is inherent in the very theory of our institutions, that the judges of our courts shall be the ultimate arbiters of judicial questions; responsible only to the sovereign people. The duties of a judge are public duties, imposed by law. He must perform them. He cannot

escape nor evade them. If he acts corruptly or incompetently, he is responsible in another form. He may be impeached. And in Massachusetts, he may be removed by the governor, with consent of the council, upon the address of both houses of the legislature. Const. of Mass. pt. 2, *c.* 3, § 1.

It is inconsistent with the nature and true theory of the judicial functions, that an action should lie against a superior judge, for any judicial act, even though in excess of his jurisdiction.

3. The very foundation of this principle is to protect judges *when they have erred.* If they have decided rightly, they need no protection; for the correctness of their decision will vindicate them. But, since men's judgments are fallible, it is important and indispensable that judicial decisions shall be as independent and impartial as the lot of humanity will permit. This is the one thing, in the administration of justice, that we cannot possibly spare. We must have impartiality. Even an impartial judge will sometimes err. But a partial judge must often err. To secure the maximum of impartiality, a judge must be protected from personal responsibility for his errors, if he happens to make any. It would be absurd to say that he should receive the protection of the law only in those cases where no protection is required. See *Taafe* v. *Downes*, *ubi supra*, 54.

4. This protection is for the sake of the public. It is in order to secure a calm, steady, independent, vigorous administration of justice and the laws. A judge should be enabled and ready to act with promptitude and vigor, *pro salute reipublicæ*. 4 Inst. 71. 11 Co. 98.

Accordingly, for more than five hundred years, by a uniform series of decisions, judges have been held exempt from personal responsibility for their judicial words and acts.

(A.D. 1354.) Book of Assizes, 27 Edw. III. *pl.* 18.
(" 1431.) 1 Rol. Ab. 92; 9 Hen. VI. 60, B.
(" 1561.) *Gwynne* v. *Poole*, Lutw. 937, in argument.
(" 1589.) *Green* v. *Hundred of Buccles Church.* 1 Leon. 323, in argument.

(A.D. 1608.) *Floyd & Barker's Case*, 12 Co. 23.
(" 1616.) *Bagg's Case*, 11 Co. 93 *b*.
(" 1621.) *Aire* v. *Sedgwick*, 2 Rol. R. 199.
(" 1633.) *Metcalf* v. *Hodgson*, Hutton, 120.
Bushell's Case, 1 Mod. 119.
Hammond v. *Howell*, 1 Mod. 184; *S. C.* 2 Mod. 218.
Ewenvelt v. *Burwell*, 1 Ld. Raym. 454; *S. C.* 1 Salk. 200.
Anon. 1 Salk. 201.
Mostyn v. *Fabrigas*, 1 Cowp. 172. (by Mansfield.)
Duke of Newcastle v. *Clark*, 8 Taunt. 632.
Garnett v. *Ferrand*, 6 B. & C. 611.
Miller v. *Hope*, 2 Shaw's App. Cas. 125.
Kemp v. *Neville*, 7 Jur. (N. S.) 913.
Scott v. *Stansfield*, Law Rep. 3 Exch. 220.
Brodie v. *Rutledge*, 2 Bay, (S. C.) 69.
Phelps v. *Sill*, 1 Day, 315.
Yates v. *Lansing*, 5 Johns. 283; *S. C.* 9 Johns. 395.
Cunningham v. *Bucklin*, 8 Cow. 78.
Weaver v. *Devendorf*, 3 Denio, 117.
Burnham v. *Stevens*, 33 N. H. 247.
Kelley v. *Dresser*, 11 Allen, 31.

The case of *Taafe* v. *Downes*, 3 Moore P. C. 41, in note, is very instructive on this point. The defendant, being Lord Chief Justice of the King's Bench in Ireland, issued a warrant in chambers to arrest the plaintiff for a breach of the peace, and the plaintiff was arrested accordingly and brought before the defendant, and held to bail; and afterwards brought this action for damages. It was greatly argued for the plaintiff that it was not lawful for a judge, without any offence committed, or charge of crime made upon oath, to imprison a

subject. But the decision went upon the broad ground, that the defendant was acting in a judicial capacity, and therefore not liable, whether he exceeded his authority or not. Mayne, J. said: "Here is an act done by one who is a judge; done in a matter which is within his jurisdiction as a judge; and *bona fide* intending to act therein as a judge. How then can it be imagined that it is not a judge's act?" p. 45, *n.* Fox, J. conceded that the defendant's act was illegal; yet held him exempt from liability. pp. 51, 52, 54, 57. See also opinion of Norbury, J., pp. 60, *et seq.*

In *Yates* v. *Lansing*, 5 Johns. 283; *S. C.* 9 Johns. 395, the defendant, being Chancellor of New York, committed one of the officers of his court for malpractice and contempt. This act was apparently in violation of law; and this action was brought to recover a statute penalty therefor. Chief Justice Kent virtually admitted that the chancellor had exceeded his powers, but said: "Whether the court of chancery was right or wrong in considering that the plaintiff's conduct amounted to a contempt, and whether it took the proper steps to ascertain the contempt, is perfectly immaterial *as to the point of jurisdiction.*" 5 Johns. 289. "Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public, they become contemptible." Ib. 298.

See, also, *Miller* v. *Hope*, and *Kemp* v. *Neville*, above cited; and *Le Caux* v. *Eden*, Doug. 535.

IV. The present case does not require the application of so broad a doctrine as that above contended for. Here, the subject matter and the plaintiff were both within the jurisdiction of the court. This case presents, at the most, only the question whether a superior judge can be sued for proceeding irregularly, or *inverso ordine*, in a matter where he has full jurisdiction. The subject matter was the removal of an attorney from the bar for gross misconduct. The person was an attorney of the court. These were both within the complete jurisdiction of the superior court. The only question is,

whether Mr. Justice Brigham should have required some different form of complaint, some writing different from the charge which was contained in the letter of Leighton to Captain Green, some more formal written charge or accusation against the plaintiff.

Waiving for the moment the consideration of the question whether, under the rules of law, the defendant should have insisted upon some different form of complaint, it is obvious that this question was one calling for a judicial determination by him. It was for him to decide judicially what form of proceeding would be correct; and this court is now asked to say judicially that he decided wrongly. Even if it were conceded that Mr. Justice Brigham's decision was wrong, (which is by no means conceded,) that would not advance the argument; for his decision was a judicial one, in respect to a subject matter and a person within his jurisdiction.

Curious results would follow from a contrary doctrine. Suppose that the defendant consulted several of his associates, who all concurred with him; or suppose that two or more of the justices acted together upon this matter; and that they nevertheless came to a wrong decision; would all be liable in damages? If so, should they be sued jointly or severally? In case one dissented, should he be held liable with the rest, or should he, by reason of his dissent, be exonerated, and the rest held liable? This would be to offer a bounty on dissent. Suppose the case was carried by appeal, or otherwise, before another tribunal, which ratified the doings of the first, and yet this court should think both tribunals mistaken; should the justices of the higher tribunal be also liable in damages? And if so, should they be sued separately, or jointly with the justices of the superior court? Are the justices of the supreme judicial court of Massachusetts, who held that the doings of Mr. Justice Brigham were, in all respects, conformable to the constitution and laws, also liable in damages? If so, before what tribunal should they be sued? If small damages were claimed, would a justice of the peace, or a judge of inferior jurisdiction, have authority to entertain the case, and pass upon the question whether his superior judges acted and

decided rightly or wrongly? It cannot be that such is the law. "There is no court equal to the trial of a superior judge." *Le Caux* v. *Eden*, Doug. 535. Were the law otherwise, (to use the words of Lord Stair, quoted in 2 Shaw's Appeal Cas. 134,) "no man but a beggar or a fool would be a judge."

This question does not depend upon reasoning alone. The case of *Ackerley* v. *Parkinson*, 3 M. & S. 411, is precisely in point. It was there held that no action would lie against the vicar general of the bishop, for excommunicating the plaintiff with the greater excommunication, for contumacy in not taking upon himself the administration of an intestate's effects, to whom the plaintiff was next of kin, and with whose goods he had intermeddled, although the citation to the plaintiff was void, and had been so adjudged; because the vicar general had jurisdiction over the subject matter, and there was no malice. The citation being void, the plaintiff was not legally before the court, and the proceedings were reversed on that ground. But it was held, with great force of reasoning, by Lord Ellenborough, and Bayley, J., that, as the subject matter was within the jurisdiction of the vicar general, he could not be held liable in damages because he had proceeded erroneously, or *inverso ordine*. Assume, for the moment, that Mr. Justice Brigham was wrong in his decision, and *Ackerley* v. *Parkinson* is on all fours with the present case. "No authority" said Lord Ellenborough, "has been cited to show that the judge would be liable to an action where he has jurisdiction, but he has proceeded erroneously, or, as it is termed, *inverso ordine*." p. 425. Bayley, J. said: "If then the ecclesiastical judge had jurisdiction, on what foundation does this action stand? There is no other foundation than this, that the ecclesiastical judge, who had jurisdiction, has not framed his citation in the form in which it ought to be, or that he has pronounced excommunication sooner than he ought, or that he has adopted a proceeding which the course and practice of the ecclesiastical court do not warrant. But that is nothing more than error in the exercise of the judicial functions with which he is invested."

See, also, to the same effect, *The Marshalsea*, 11 Co. 68, *b*; *Gwynn* v. *Poole*, Lutw. 937; *Lowther* v. *Earl of Radnor*, Ld. Raym, 229; *Truscott* v. *Carpenter*, 8 East, 113; *Yates* v. *Lansing*, 5 Johns. 289.

V. There is another aspect of this case which is decisive. It was contended on the part of the plaintiff, by Governor Andrew, in the circuit court, that the plaintiff has been illegally deprived of rights which he held under the constitution of Massachusetts, which provides that "no subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him;" nor be "despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate, but by the judgment of his peers, or the law of the land." Dec. of Rights, Art. 12. There are no similar provisions in the Constitution of the United States. This is therefore a question of the construction of the constitution of Massachusetts.

But who is to judge of this? Surely the supreme court of Massachusetts. A judicial interpretation by the highest court in the state, of its own constitution, not called in question by its own tribunals, and no other decision tending in any manner to shake it, is conclusive in this court. *Bank of Hamilton* v. *Dudley*, 2 Pet. 492. *Provident Savings Inst.* v. *Commonwealth*, 6 Wallace, 611, 630.

The correctness of the proceedings of Mr. Justice Brigham has been in all respects confirmed, after a full and exhaustive discussion, by the supreme judicial court of Massachusetts. *Randall*, pet'r, 11 Allen, 479.

VI. Finally, if this court will inquire into the correctness of the proceedings of Mr. Justice Brigham, after the decision of the supreme judicial court of Massachusetts thereon, it is apparent that those proceedings were in all respects correct. The foregoing positions have not been taken through any lack of confidence in this final position. There was a written

complaint, made by the person who was aggrieved by the conduct of the plaintiff, addressed to his superior officer, and by that officer transmitted to the grand jury, and by the grand jury presented, through the appropriate officer, to the court. There was a charge in writing, which involved and included the substantial misconduct of the plaintiff. The existence of this written charge and complaint appears upon the record. (Transcript, pp. 9, 10, 24.) No further charge or complaint was necessary. Indeed, no complaint or charge whatever in writing was necessary. This whole subject is discussed, and put upon a satisfactory foundation, by Bigelow, C. J., in 11 Allen, 478–480.

The plaintiff was notified, had full opportunity to be heard, and was fully heard. The charges against him were satisfactorily established, and showed a degree of misconduct which rendered his removal from the bar an imperative duty. There is no more indulgent tribunal anywhere, to judge of the alleged misconduct of a young member of the bar, than the bench and bar of Massachusetts. This defendant has but done his duty. He has acted according to his judgment; uprightly; discreetly. This cause concerns the people of Massachusetts as much as this defendant. The question involved is no less than this: Whether the people of Massachusetts shall be secure in their possession and enjoyment of a learned, upright, independent and resolute judiciary.

CHARLES ALLEN,
for the Defendant.

Supreme Court of the United States,

SAMUEL H. RANDALL,

Plaintiff in Error.

v.

LINCOLN F. BRIGHAM,

Defendant in Error.

PLAINTIFF IN ERROR'S BRIEF ON THE ASSIGNMENT OF ERRORS.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1867.

SAMUEL H. RANDALL, PLAINTIFF IN ERROR,

v.

LINCOLN F. BRIGHAM, DEFENDANT IN ERROR.

ABSTRACT OF PLEADINGS AND PROOFS.

THE first count of the declaration alleges, That whereas the said plaintiff, at Boston, in the County of Suffolk and Commonwealth of Massachusetts, before and at the time of the committing of the grievances complained of, was in the lawful possession of the office of an Attorney and Counsellor at Law, with the right and privilege at all times freely to enjoy said office by practising as an Attorney and Counsellor at Law in any of the Courts of said Commonwealth, by means whereof the plaintiff was enabled to earn and did earn divers profits and emoluments to the amount of about Three thousand dollars per annum. Yet, the said defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure and disturb the said plaintiff and to deprive him of the right and privilege, use, benefit and profit of his said office, whilst the plaintiff was so possessed and so in the enjoyment of the same, on the 10th day of October, 1864, unlawfully and without the leave or license and against the will of the said plaintiff, entered, or caused, procured and directed to be entered upon the docket and records of the Superior Court, within and for said County of Suffolk, holden at Boston, at the October Term thereof for Criminal Business, an Order removing the plaintiff from the office of an Attorney at Law within said Commonwealth, and thereby greatly disturbed the said plaintiff in the enjoyment of his said office, and prevented him from having the use and benefit thereof in so full and

ample a manner as he otherwise might and would and ought to have done and was lawfully entitled to do, and thereby, during all that time, and thereafter to the day of the purchase of this writ continued, hindered and prevented the said plaintiff from enjoying said office, and from practising in, and exercising his rights of Attorney and Counsellor at Law in any of the Courts aforesaid, for the purposes aforesaid, and whereby the plaintiff could not, during the time aforesaid, have or enjoy the use of said office in so ample and beneficial a manner as he otherwise might and ought to do and would have done, and hath been greatly disturbed and molested in the use and enjoyment thereof, as aforesaid. Wherefore, by reason of the unlawful, wrongful, and unjust acts of said defendant, the plaintiff says he is injured and hath sustained damage to the amount of Seven thousand dollars, as is more fully and particularly, in said first count of the declaration, detailed and specified.

The second count of the declaration alleges, — That whereas the said plaintiff, at Boston, in the County of Suffolk, and Commonwealth of Massachusetts, before and at the time of the committing of the grievances complained of, was in the lawful possession of the Office of an Attorney at Law, with the right and privilege, at all times freely to enjoy said office, by practising as an Attorney at Law in any of the Courts of said Commonwealth, by means whereof the plaintiff was enabled to earn and did earn divers profits and emoluments. Yet the said defendant, being one of the Justices of the Superior Court, within and for the County of Suffolk aforesaid, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure and disturb the said plaintiff and to deprive him of the right and privilege, use, benefit and profit of his said office, whilst the plaintiff was so possessed, and so in the enjoyment of the same, in the month of October, A. D. 1864, unlawfully and without the leave or license and against the will and objection of the plaintiff, and contrary to and in violation of said defendant's duty as a magistrate aforesaid, and of the legal rights of said plaintiff, which said defendant, as magistrate, was particularly bound to respect, under and by color of his said office of magistrate aforesaid, but without any lawful authority or jurisdiction whatsoever, in the premises, and wantonly, arbitrarily and oppressively, removed said plaintiff from his office of Attorney at Law, as aforesaid; and entered, or caused, procured and directed to be

entered upon the docket and records of the Superior Court, within and for said County of Suffolk, holden at Boston, at the October Term thereof, for criminal business, an Order removing the plaintiff from the office of an Attorney at Law, within said Commonwealth, and thereby greatly disturbed the said plaintiff in the enjoyment of his said office, and prevented him from having the use and benefit thereof, in so full and ample a manner as he otherwise might and would have done and was lawfully entitled to do, and thereby, during all that time, and thereafter to the day of the purchase of this writ, continued, hindered and prevented the said plaintiff from enjoying said office and from practising in and exercising his rights as Attorney at Law, in any of the Courts aforesaid, for the purposes aforesaid; and whereby the said plaintiff could not, during the time aforesaid, have or enjoy the use of said office in so ample and beneficial a manner as he otherwise might and ought to do and would have done, and hath been greatly disturbed and molested in the use and enjoyment thereof, as aforesaid. Wherefore, by reason of the unlawful, wrongful, unjust and oppressive acts of said defendant, the plaintiff says he is injured, and hath sustained damage, to the amount of Seven thousand dollars, as is more fully and particularly, in said second count of the declaration, detailed and specified.

The defendant filed the following plea, — And now the defendant comes when &c., where &c., and, for plea, says, that he is not guilty in manner and form as the plaintiff hath, thereof, alleged against him, and of this he puts himself upon the country for trial.

Upon which plea the plaintiff joined issue.

The testimony in the case, which was produced wholly by the plaintiff, is chiefly addressed to the following points: —

First. Showing the Title of the plaintiff to the Office of an Attorney at Law and his right to the enjoyment of all the privileges of the same. The testimony of Mr. Wilde clearly establishes the plaintiff's allegations on this branch of the case.

Secondly. Showing the Disturbance of the plaintiff in the possession and enjoyment of the rights, privileges and benefits of his office, by the wrongful and illegal action of the defendant. The testimony of Mr. Underwood, and that, also, of the plaintiff, fully confirms all the allegations in either count of the declaration as to

the disturbance and grievances complained of, and clearly demonstrates that those allegations are, in no respect, overstated or exaggerated.

The record of the judgment or order, so called, which was put in evidence by the plaintiff as the disturbance and obstruction complained of, as it exists on the Record Book of Judgments of the Superior Court, in no way derogates from the legal force and effect of the oral testimony of Mr. Underwood and the plaintiff, establishing it as an act of disturbance. On the contrary, it is evident, on the face of the "proceeding," that the judgment or order pronounced against the plaintiff was founded on private knowledge existing only in the breast of the defendant, and which had been ascertained by him at an oral, extra-judicial and self-appointed inquiry carried on at the September Term which had adjourned *sine die*, and without any case being continued over to the October Term at which the judgment or order was pronounced and filed; and which proceeding or record of the judgment or order contains no proof within itself of any subject matter or charge of any offence of any kind against the plaintiff, contained in any form of legal process or proceeding, referred by any party or person, to the judgment of the Superior Court or to any Justice thereof, and no proof of any legal notice or process of any kind issued by the Superior Court or any Justice thereof, to the plaintiff, calling upon him to answer any charge that had been preferred against him, and no proof of any appearance entered by the plaintiff in any judicial proceeding in which he was named as a party, existing of record in the Superior Court, at either the September or October Terms, A. D. 1864, of said Court. But said proceeding, *prima facie*, shows, that all the formalities required by law, in civilized countries, to give a judgment a conclusive operation are totally wanting in this "proceeding;" that the punishment awarded or forfeiture worked was decreed by mere arbitrary power, without any legal trial, and without any regard by the defendant to the substantial requisites of a *judicial inquiry*; that judgment was pronounced when no *case* existed demanding or calling for judgment, which is without any legal premises on which to support itself, to which is subscribed the individual name of the defendant, as being his own arbitrary judgment instead of that of the Law pronounced through him as a Judge of the Superior Court, as the agent of the Law, upon alle-

gations existing in the record; and which judgment or order, as to its legal force, effect and validity, is a mere nullity, disclosing nothing showing it to be a *judicial act* and whereby it can be held to operate as a protection and justification to the defendant, by whose action and authority it was created and established, but as corroborating in itself, and being in entire harmony with, all the other evidence in the case, and proving beyond all possibility of controversy that the action of the defendant was a wrongful and illegal disturbance of the plaintiff's rights, accomplished by a bold usurpation of power.

Thirdly. To the question of Damage.

All the allegations of the declaration on this point are fully met by the proofs.

Fourthly. The Laws of the State of Massachusetts, read by the plaintiff in evidence and embodied in the record, clearly furnish the rules of decision by which the legal rights of the parties to this controversy are to be determined.

STATEMENT, ON THE ASSIGNMENT OF ERRORS, AS THE THEORY OF THE PLAINTIFF IN ERROR'S CASE.

The only special error assigned, and upon the validity of which the only general assigned error depends, to wit, "that the Court instructed the jury that, upon the plaintiff's evidence, the action in judgment of law cannot be maintained, and that their verdict should be for the defendant," is well assigned in Law.

For the Case made by the plaintiff in error, by his allegations and proofs before the Circuit Court for the District of Massachusetts, clearly established these facts, — That the plaintiff was in the lawful possession and enjoyment of a legal right, an estate, privilege or property; that the defendant wrongfully and illegally disturbed and molested the plaintiff in the possession and enjoyment of that property, and that the plaintiff sustained loss and damage by reason of said disturbance. Thus establishing every element required at the common law to successfully maintain an action on the case for disturbance, in a Court administering justice according to

the course of the common law, and thereby demonstrating, that the ruling of the Circuit Court, to which exception was duly taken, and which has been assigned as a manifest error apparent on the face of the record and proceedings now before the Supreme Court of the United States, and whereby judgment of Law in said Circuit Court was given for the defendant against the plaintiff, in law is erroneous, and that, by the Law of the Land, said judgment should have been given for the plaintiff against the defendant in said Circuit Court; and that said judgment so erroneously given should now, by the Supreme Court be reversed, and judgment ordered to be entered in said Circuit Court for the plaintiff against the defendant, with his damages assessed at such sum, as this Court, drawing the same inferences from the evidence, as the jury at the trial could have drawn, upon the whole record, shall, in law and justice, deem the plaintiff to be entitled to recover, if the Court, in the exercise of its discretion, shall regard it as not unreasonable to assess the damages of the plaintiff in error, without awarding a Writ of Inquiry.

THE POINTS AND AUTHORITIES

OF THE

PLAINTIFF IN ERROR.

LEADING PROPOSITIONS OF THE PLAINTIFF IN ERROR'S ARGUMENT.

I.

The Plaintiff's Office of Attorney at Law is Property.

II.

The Order recorded on the Record Book of Judgments of the Superior Court purporting to work a forfeiture of the plaintiff's property, is an individual act of disturbance created by the defendant by a usurpation of power, and not a judgment of Law pronounced by the Superior Court.

III.

The Order of the defendant, not being a judicial act done within his jurisdiction, as a Judge of the Superior Court, furnishes no protection in law, exempting him from liability in damages, for disturbing and depriving the plaintiff of the privileges and emoluments conferred by his Office.

I.

"Each individual of the Society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws."

Art. 10, Declaration of Rights. Constitution of Massachusetts. Adopted A. D. 1780.

"The terms 'life, liberty and property,' comprehend every right known to the law. Property includes those estates which one may acquire in professions, which are often the source of the highest emoluments and honors."

Per Field, J. Cummings v. State of Missouri. 4 Wall. 277.
Gorham v. Luckett. 6 B. Munroe, 146.
Allen v. McKeen. 1 Sumn. 277.
Sevier v. Justices of Washington County. Peck's Rep. 334.
Avery v. Tyringham. 3 Mass. 160.
Hardin County v. Hardin. Peck's Rep. 291.
Wammack v. Halloway. 2 Alabama, 31.
Brewer v. Davis. 9 Humph. 208.
Millar v. Taylor. 4 Burr. 2345.
Shaw's Case. 12 Mod. 113.
Dr. Bentley's Case. 1 Strange, 557.
Dr. Gaskin's Case. 8 T. R. 209.
Queen v. Governors of Dashington School. 6 A & E. 700.
Capel v. Child. 2 Crompt. & Jerv. 558.
The Queen v. Smith. 5 Q. B. 621.
The Queen v. Saddler's Co. 10 House Lords Cases, 404.
McMahon v. Lennard. 6 House Lords Cases, 970.
Willis v. Sir G. Gipps. 5 Moore's P. C. 379.
Rogers v. Dutt. 12 Moore's P. C. 209.
Bonaker v. Evans. 16 Q. B. 162.
Ex Parte Ramshay. 18 Q. B. 187.
Wilde v. Russell. Eng. Com. Pleas, Rep. Dec. 1866. P. 728.
People v. Burbank. 12 Calif. 378.
Calder v. Bull. 3 Dallas. 386.
Fletcher v. Peck. 6 Cranch. 135.
James Prescott's trial before Senate of Massachusetts, p. 122.
2 Blac. Com. Secs. 36, 37.

The statute of Massachusetts, which provides for and authorizes the admission of applicants, when found to be duly qualified by the Supreme Judicial or Superior Court, to the office of Attorney at Law, with the right and privilege to practise, when admitted by

either court, in all the courts of the State, *makes no limitation of the time* for which the office shall be held and enjoyed; but provides that, "an attorney may be removed by the Supreme Judicial or Superior Court, for any deceit, malpractice, or other gross misconduct."

See General Statutes, Chap. 121, Sects. 28 to 34, continuing the same provisions which existed in the Revised Statutes of the State of A. D. 1836, in relation to Attorneys at Law.

The grant of the "Office of Attorney," at common law, is the grant of an office for the life, or during the good behaviour of the grantee.

And it has been variously declared by the Courts to be, a 'License,' a 'Privilege,' a 'Franchise,' a 'Freehold,' a 'Right to practise law in Courts,' a 'Profession which is the high road to wealth and distinction.'

7 Bouv. Bac. Abr. "Office," 308.
Ex Parte Hennen. 13 Pet. 259.
" Garland. 4 Wall. 333.
" Austin. 5 Rawle, 194.
" Swett. 20 Pick. 1.
" Jephard. 1 John's Cases. 181.
" Secombe. 19 How. 9.
" Burr. 9 Wheat. 529.
" Sayre. 7 Cowen. 368.
" Leigh. 1 Mumf. 481.
" Fisher. 6 Leigh, 619.
State of Iowa v. Start. 7 Iowa, 499.
Anonymous. 4 Johns. 191.
In re Cooper. 22 N. Y. 81.
In re Dorsay. 7 Porter, 381.
"Judges Opinions." 20 Johns. 492.
Bruce v. Fox. 1 Dana, 450.
Fletcher v. Daingerfield. 20 Calif. 430.
People v. Turner. 1 Calif. 151.
Bradley's Case. 19 Mass. Law Rep. 430.
Vise v. Hamilton. 19 Ill. 78.
Comw. v. Judges of Cumberland County.
1 Serjt. & Rawle, 187.
Ex Parte Heyfron. 7 How. Miss. 127.
The People v. Lamborn. 1 Scam. 123.
Mill's Case. 1 Michigan, 193.
Chapman's Case. 11 Ohio, 430.
In re King. 8 Q. B. 129.

Hurst's Case. 1 Lev. 75.
Gilman v. Wright. 1 Sid. 410.
White's Case. 6 Mod. 18.
Hasting's Case. 1 Sid. 410.
King v. Sheriff of York. 2 Show. 154.
Barber's Case in English Courts.
In re the Justices of Antigua. 1 Knapp's Privy Council Rep. 267.
In re Monckton. 1 Moore's Privy Council, 455.
Smith v. Justices of Sierra Leone. 3 Moore's Privy Council, 361.
In re Downie and Arundell. 3 Moore's Privy Council, 414.
Morgan v. Leach. 3 Moore's P. C. 368.
Miller v. Hope. 2 Shaw's App. Cas. House Lords, 125.
Stat. 4 Hen. IV. c. 18.
Stat. 3 James 1. c. 7.
Stat. 2 Geo. 2. c. 23.
Stat. 6 Geo. 2. c. 27.
Stat. 6 and 7 Vict. c. 73 sec. 27.

Hilburn v. State. 36 Fla. 252
Act of 24 Sept. 1789. See 35. 1 US. Stat 92.

"It is said that at Common Law, all officers of justice had estates in their respective offices, during life, and could not be removed but for *misdemeanors*. And, in this respect, the wisdom and policy of the law was very great; because, when men held their offices for life, it was an encouragement to the faithful execution of their duties. It was then, also, they endeavored to acquire knowledge and experience in their employments, having a durable and fixed estate therein, and not liable to be displaced at the pleasure of those who put them in."

"If an office be granted to a man to have and enjoy so long as he shall behave himself well in it, the grantee hath an estate of freehold in the office; for, since nothing but his misbehavior can determine his interest, no man can prefix a shorter time than his life. Since it must be his own act (which the law does not presume to foresee), which only can make his estate of shorter continuance than his life."

7 vol. Bouv. Bac. Abr. Tit. Office, p. 308, citing Harcourt v. Fox. Show. 428. 4 Mod. 167.
2 Peckwell's Cases, 89, and other cases.

"All offices, the tenure of which is not fixed by the Constitution, or limited by law, must be held, either during good behavior, or (which is the same thing in contemplation of law), during the life of the incumbent, or must be held at the will and discretion of some department of the Government, and subject to removal at pleasure.

"The position in England is that, unless the Statute which creates the office limits its tenure at the time of the creation, it is an office for life, as at the Common Law."

Per Thompson, J. Ex parte Hennen, 13 Peters, 259.

In Hurst's case, 1 Levintz. 75. A mandamus was granted to restore him to his office, because, it was said, "He is an officer concerning the public justice, and is compellable to be Attorney for any man, and has a *freehold* in his place." — Lord Holt, C. J., reaffirmed this doctrine in White's case. 6 Mod. 18.

"An attorney and counsellor being, by the solemn judicial act of the Court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the Court, or at the command of the Legislature. It is a right of which he can only be deprived by the judgment of the Court, for moral or professional delinquency."

Per Field, J., delivering opinion of the Court. In Ex parte Garland, 4 Wall. 333.

"The office of an attorney is not put above the judiciary, and is entitled only to an equal share of independence."

"An attorney at law is an officer of the Court, and his office is an office *for life*. The grant of an office without express limitation at common law being taken most strongly against the grantor, endures for the life of the grantee; and though the principle has not been applied to offices within the grant of the Executive, it must necessarily be applied to the office of attorney. For, to subject the members of the profession to removal at the pleasure of the Court, would leave them too small a share of the independence necessary to the duties they are called upon to perform to their clients and to the public. As a class, they are supposed to be, and, in fact, have always been, the vindicators of individual rights, and the fearless assertors of the principles of civil liberty; existing, where alone they can exist, in a government, not of parties or men, but of laws."

Per Gibson, C. J., delivering the opinion of the Court, in Ex parte Austin, 5 Rawle, 194.

In Vise et al. v. County of Hamilton. 19 Ill. Rep. 78. Plaintiffs being attorneys, were appointed by the Circuit Court to defend a man criminally accused, who was unable to employ counsel. The attorneys subsequently brought suit to recover for their services; but judgment was rendered against them, and, on appeal, affirmed by the Supreme Court, in the following opinion:

"In criminal prosecutions, the accused has the right to be heard and to defend by himself and counsel; and such is the benignity of our institutions, that lest the innocent suffer for want of proper defence, the Court, in case of inability of the accused to obtain counsel, will appoint counsel for him, and may compel the counsel as an officer of the Court, subject to its authority, to defend the accused against unjust conviction."

"The law confers on licensed attorneys rights and privileges, and with them imposes duties and obligations which must be reciprocally enjoyed and performed. The plaintiffs but performed an official duty, for which no compensation is provided."

"The law itself presumes the right to practise law is a valuable right, as it confers it as a boon on those who can and are willing to take the oath. Can it be seriously contended that it is not a valuable right, and as deserving of protection as property? Suppose the right to practise law was confined to a particular class or order of men, by law, would it not be esteemed a most valuable privilege? And if the right of entering this fraternity could be purchased with money, would it not command a high price? I think there can be no doubt of it; and if so, exclusion from it must be the privation of a valuable right, as worthy of the protection of the law as property."

"The law in question, therefore, is contrary to the spirit, the plain intent and meaning of that part of the tenth section of the bill of rights which provides that 'no one shall be deprived of life, liberty, or property, but by due course of law."

Collier, C. J., delivering opinion of the Court. In re Dorsay, 7 Porter, Ala. 381.

II.

"No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him, face to face, and to be fully heard in his defence by himself, or his counsel, at his election."

"And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land."

Article 12, Declaration of Rights, Constitution of Massachusetts, A. D. 1780.

And the same provisions are substantially in all the American Constitutions.

See Greene v. Briggs. 1 Curtis, C. C. Rep. 325.
Wynehammer v. The People. 3 Ker. 392.
Magna Charta, C. 29. Art. 5, Amend. U. S. Const.

At the Common Law, the words *Crime* and *Offence* are used as substantially synonymous and universal terms; and as comprehending every act for which a forfeiture of any legal right might be worked, or penalty imposed, or punishment inflicted, in any form of judicial proceeding.

Tomlin's Law Dict. p. 664 Tit. "Crime."
Bouv. Law Dict. 1868 Edit., and Cases cited.
2 Swift's, Rev., Dig. 284.
4 Black. Comm. 5, 6 and note 3 Wendell's Edit.
Comw. of Kentucky v. Dennison. 24 How. 99.
1 Chitty's Practice 14.
The King v. Shaw. 12 Mod. 413.
1 Bishop's Criminal Law, Sec. 43.
2 Burrill's Law Dict. 766.
Bonaker v. Evans. 16 Q. B. 171.
James Prescott's Trial, p. 124.

"A crime or misdemeanor is an act committed or omitted in violation of a public law, either forbidding or commanding it. This general definition, comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms; though in common usage, the word *crimes* is made to denote such offences as

are of a deeper and more atrocious dye, while smaller faults and omissions of less consequence, are comprised under the gentler name of *misdemeanors* only."

4 Black. Comm. 5.

"The word '*crime*' of itself includes every offence from the highest to the lowest in the grade of offences, and includes what are called 'misdemeanors,' as well as treason and felony."

Per Taney, C. J. Comw. of Ky. v. Dennison. 24 How. 99.

"The word '*offence*,' in criminal cases, is the doing that which a penal law forbids to be done, or omitting to do what it commands. In this sense it is nearly synonymous with *crime*. In a more confined sense it may be considered as having the same meaning as misdemeanor; but it differs from it in this, that it is not indictable, but punishable summarily or by the forfeiture of a penalty."

1 Chitty's Pract. 14.

"The term 'offence' is usually, by itself, understood to be a crime not indictable, but punishable summarily, or by the forfeiture of a penalty."

Tomlin's Law Dict. p. 664.

"As to the clause in the constitution of this Commonwealth, 'no subject shall be held to answer for any crime or offence until the same is fully and plainly, substantially and formally, described to him;' the first question which presents itself for our consideration is, whether among the crimes and offences here alluded to were intended to be included as well those which are triable before the highest court of judicature, in the form of impeachment, as those which are cognizable only by the inferior tribunals in a proceeding by indictment? whether in fact it could have been intended by the constitution to afford a security and protection to the rights of the merest vagrant in our streets which should not also be extended to the highest magistrate of the Commonwealth. It would be absolutely affrontive to the dignity of this Hon. Court, were I to suppose it possible that they would condescend to listen

to an argument upon this question. I will therefore venture to assume it as an admitted position that the terms 'crimes and offences,' as they are employed in this clause were intended to comprehend every species of delinquency, whether of the magistrate or the individual, which could be made the subject of a criminal prosecution in any form of proceeding or before any judicial tribunal known and established by the law of the land. If this be true, it follows thence as a conclusion, that no person in the Commonwealth can be held to answer any more upon impeachment before this High Court than upon indictment before the inferior tribunal until the *offence* with which he is charged shall be fully and plainly, substantially and formally, described to him."

Argument of Hon. George Blake as Counsel for Respondent in Prescott's Trial, before Senate of Massachusetts, p. 124.

"The provision in the constitution of Massachusetts, 'that no subject shall be held to answer for any crime or offence until the same is fully and plainly, substantially and formally, described to him,' does in no respect change the rules of the Common Law, and such has been the construction put upon it from the adoption of the Constitution to the present time."

Shaw, C. J., Comw. v. Davis. 11 Pick. 432-8.

"The declaration of rights was framed by men well acquainted with the Common Law as well as with the colonial and provincial regulations and practice of Massachusetts. And it may be observed that the declaration is not limited in its operation to crimes which are capital or otherwise of magnitude, but that it embraces *all criminal trials*, as well those for small misdemeanors as those for crimes of a heinous nature punishable with death."

Parker, C. J., Comw. v. Parker. 2 Pick. 553-4.

"This provision has recognized and enforced and extended to every mode in which a citizen can be called to answer to any charge of crime."

Shaw, C. J., Comw. v. Phillips. 16 Pick. 211-13.

"The object of the Declaration of Rights was to secure substantial privileges and benefits to parties criminally charged; not to require particular forms, except where they are necessary to the purposes of justice and fair dealing towards persons accused, so as to ensure a full and fair trial."

Shaw, C. J., Comw. v. Holley. 3 Gray, 458.

The words the "law of the land" as they stand in *Magna Charta* and the American Constitutions mean "due process of law." And "due process of law," implies that, in every Judicial proceeding, there shall be some form of legal process, sufficient allegations or charge, due notice to the party proceeded against, the opportunity to answer to and contest the charge or allegations, and to be heard or tried in a legal and regular course of judicial proceedings, by an impartial Judge, and a judgment of the Law, only upon the matter alleged or charged, if duly established or proved against the party, of which a legal record shall be preserved as a memorial of the cause. And these rights exist in all cases, civil or criminal, whether by the exercise of a Court's ordinary jurisdiction with trial by jury or by the exercise of the discretionary or summary jurisdiction of a Court without the right to trial by jury.

Flint River Steamboat Co. v. Foster. 5 Ga. 218.
Greene v. Briggs. 1 Curtis C. Ct. 325.
Bank of Columbia v. Okeley. 4 Wheat. 244.
Bank of Columbia v. Ross. 4 Harr. & McHen. 455.
McGinnis v. State. 9 Humph. 43.
Murray v. Askew. 6 J. J. Marsh. 27.
Wells v. Caldwell. 1 Marsh. 441.
Lewis v. Garrett. 5 How. Miss. 434.
Hoke v. Henderson. 4 Dev. R. 15.
Ervine's Appeal, 16 Penn. 263.
Norman v. Heist. 5 Watts and Sergt. 193.
Wynehammer v. The People. 3 Ker. 392.
Comw. v. Davis. 11 Pick. 434.
" " Dean. 21 " 334.
" " Philips. 16 " 213.
" " Blood. 4 Gray, 32.
Capel v. Childs. 2 Crompt. & Jerv. 558.
Dimes v. Grand Junction Rail Co. 3 House Lords, 759.
Ex. Parte Ramshay, 18 Q. B. 187.
Coke, 2 Inst. 50. 51.

Murray's Lessees v. Hoboken Land Co. 18 How. U. S. 280.
Taylor v. Porter. 4 Hill. 146.
Fisher v. McGirr. 1 Gray, 37.
In re Dorsay. 7 Porter, 405.
In re Pitman. 1 Curtis C. Ct. 131.
Regina v. Baines. 2 Ld. Raym. 1265.
2 Kent Com. 13 n.
3 Story Com. on Const. 661.
Bagg's case. 6 Coke, 182.
Rex v. Robe. 2 Strange, 999.
Rex v. Mayor of Liverpool. 2 Burr. 731.
Rex v. University of Cambridge. 1 Strange. 564.
Bonaker v. Evans. 16 Q. B. 162.
3 Black. Comm. Sec. 273 to 396.
4 Black. Comm. Chap. 20.
Sayles v. Briggs. 4 Met. 423.
James Prescott's Trial, p. 122.

"The exposition of the words 'Law of the land' as they stand in *Magna Charta* as well as in the American Constitutions has been that they require 'due process of law,' and in this is necessarily implied and included the right to answer to and contest the *charge*, and the consequent right to be discharged from it unless *it* is proved. Lord Coke says, they mean 'due process of law,' and the Jurists of our Country have not relaxed this interpretation."

Curtis, J., Greene v. Briggs. 1 Curtis, C. Ct. 325.

"The Constitution of the United States ordains, 'that no person shall be deprived of life, liberty *or property* without due process of law,' and the Constitution of this State contains an equivalent provision in words nearly alike. It is an affirmation of a great doctrine contained in *Magna Charta*, 'neither will we pass upon any one but by the lawful judgment of his peers or by the law of the land.' And Lord Coke says that the words '*per legem terrae*,' mean by due process of law and being brought into court to answer according to law. The whole clauses in our constitutions on the subject, were established for the protection of personal safety and private property. These clauses address themselves to the common sense of the people, and ought not to be filed away by legal subtleties. They have their foundations in natural justice, and without their pervading efficacy other rights would be useless."

Coulter J., delivering opinion of the Court, in Ervine's appeal 16 Penn. 263.

"The true interpretation of these constitutional phrases 'the law of the land,' 'or due process of law,' is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the Government to take them away. But where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him in the due administration of the law itself, before the judicial tribunals of the State."

Comstock J. Wynehammer v. The People. 3 Ker. 392--393.

Of a similar clause in the Constitution of Pennsylvania, Chief Justice Gibson says: —

"The design of the convention was to exclude arbitrary power from every branch of the government. The right of property has no foundation or security but the law and when the legislature shall successfully attempt to overturn it even in a single instance the liberty of the citizen is no more."

Norman v. Heist. 5 Watts and Serjt. 193.

"No member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof unless *by the law of the land* or the judgment of his Peers." Art. 7, Sec. 1. The meaning of this section then seems to be, that no member of the state shall be disfranchised or deprived of any of his rights or privileges unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges or that some one else has a superior title to the property he possesses, before either of them can be taken from him. But if there can be a doubt upon the first section of the seventh article, there can, I think, be none that the seventh section of the same article covers the case. "No person shall be deprived of life, liberty or property *without due process of law*." The words "due process of law," in this place, cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property."

Bronson, J., delivering opinion of the Court in Taylor v. Porter. 4 Hill, 145, 147.

"Due process of law" generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings."

Curtis, J., delivering opinion of the Court in Murray's Lessees v. Hoboken Land Co. 18 How. U. S. 280.

Judge Trotter, delivering opinion of the Court in 5 How. Miss. 434, says, "The Constitution, in guaranteeing to the citizens of this State the right of trial by jury, did not intend to disturb the ancient and well established jurisdiction of the several courts of the country, nor to change entirely the modes of trial as they are regulated by the *Common Law*. For if that interpretation were given to it, no order of the Probate Court could be sustained, and the decrees of the Court of Chancery would be mere waste paper. It was designed simply to guard the people against the arbitrary or capricious interference of the government, and was conceived and adopted in the spirit of the Great Charter of English Liberty, which provides that no man shall be deprived of his life, liberty or property, except by the judgment of his peers, or the law of the land. Under this charter the people of England have long flourished in the enjoyment of a boasted freedom from any responsibility but to the declared and established laws of the land. To the rule of conduct which these laws prescribe, they submit themselves and their property, and are bound by their judgments in whatever mode they may be pronounced; and it is not regarded as any infringement of their rights, thus solemnly pledged, that in the arrangement and distribution of the powers of the several courts, which have grown up, under the common law in that country, *modes of trial in many cases are allowed which dispense with the verdict of a jury*."

"For whether the Court pronounces the judgment of law, upon facts found by the jury in cases where a trial by jury is required, *or upon facts ascertained in other modes when they are permitted, the judgment is still the award of the law*, and the inconvenience to which it may subject the party, is the result of the judgment of his peers in the one case, *and of the law of the land in the other*, and it is in this sense that the constitutions of the country have provided that no person shall be deprived of life, liberty, or property, without due process of law."

This reasoning is adopted *verbatim* by the Court in Flint River

Steamboat Co. v. Foster, 5 Ga. 218; and in the Case of the Bank of Columbia v. Okely, 4 Wheat. 235. Mr. Justice Johnson, delivering the opinion of the Court, observes: "As to the words from *Magna Charta*, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice."

"It appears that for *misdemeanors* persons might be put to answer by common law, without presentment or indictment found by a grand jury, and that it was only for crimes in the proper sense of the term, or felonious offences, that the defendant could not be put to answer without the finding of a grand jury upon presentment or indictment, and that the 14th section of the Bill of Rights, which declares that no one shall be put to answer any criminal charge except by presentment or indictment, does not prohibit the legislature from dispensing with that mode of prosecution in cases of misdemeanors."

Opinion of the Court, in McGinnis v. The State. 9 Humph. 43.

III.

The *summary* jurisdiction of a Court, therefore, does not mean that a Judge can lawfully exercise an *arbitrary* power, will or discretion, *without any process of law at all;* but it is the exercise of the discretionary power, vested by the law in the Court, to proceed by *summary process*, for the purpose of a more expeditious and effectual dispensation of justice, in those cases wherein the law has deemed the exercise of such power to be necessary by the Court, without the intervention of a jury.

2 Black. Comm. Book 4, chap. 20.
Sullivan's Lect. Sec. 39, p. 356.
The People v. Turner. 1 Calif. 151.
People v. Smith. 3 Caines, 221.
Chapman's Case, 11 Ohio, 430.
In re Pitman, 1 Curtis C. Ct. 131.
Darby's Case, 3 Wheeler's Cr. Cases, 5.
Bradley's Case, 19 Mass. Law Rep. 430.
Gorham v. Luckett. 6 B. Monroe, 146, 638.
Van Zandt v. Waddell, 2 Yerg. 260.
Statute, 12th. Geo. 1, c. 29.

The *discretionary power* of a COURT is one thing; the *discretion* of a Judge, while in the exercise of that power, another.

The discretion of a *Court* is the exercise of its incidental powers or of its judgment, on any occasion that calls for it, *after Jurisdiction has vested in the Court*, whether in an ordinary, or in a summary or discretionary proceeding.

The discretion of a *Judge* is the exercise of an arrogated or usurped power, before any, or where no sufficient jurisdiction *as a Court*, has vested in him at all. In the one case, the discretion is legal and judicial, in the other, illegal and arbitrary. In the former, a Judge is in the regular exercise of the functions of a Court, as the agent and representative of the LAW. In the latter, he is a tyrant and a *law unto himself*.

Piper v. Pearson. 2 Gray, 120.
Heard v. Pierce. 8 Cush. 338.
Comw. v Barry. Hardin, 243.
Harvie v. Canmack. 6 Dana, 243.
Rex v. Wilkes. 4 Burr. 2539.
Rex v. Young. 1 Burr. 563.
Witman v. Ely. 4 Serjt. & Rawle, 265.
Bouvier's Dict. Discretion, and cases cited.
Louisiana Code. Art. 3522, No. 13.
2 Bouv. Bac. Abr. Courts, p. 620 and cases cited.
Flint River Steamboat Co. v. Foster. 5. Ga. 204.
3 Black. Comm. C. 22, Sec. 327.

"Where there is no jurisdiction there can be no discretion; for discretion is *incident* to jurisdiction."

Bigelow, C. J., Piper v. Pearson. 2 Gray, 120.

"Discretion is the just discernment of what is right through the law, for the law will never permit any discretion which would necessarily defeat its own purposes."

Parker, C. J. Comw. v. Barry. Hardin's Ky. Rep. 243.

"The discretion vested in courts where private rights are concerned is *judicial* and not *unlimited*."

In opinion of the Court, Harvie v. Canmack. 6 Dana, 243.

"Discretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by

humour. It must not be arbitrary, vague and fanciful, but legal and regular."

Lord Mansfield, C. J. Rex v. Wilkes. 4 Burr. 2539.

"Though Discretion does mean (and can mean nothing else but) exercising the best of their judgment upon the occasion that calls for it, yet if this discretion be wilfully abused it is *criminal* and ought to be under the control of this Court. For *though* the justices have, it is true, a discretion in these cases, yet, *it must not be permitted* to them to exercise an *arbitrary* and *uncontrolled power* over the rights of other people and in cases where their *livelihoods* are essentially concerned."

Lord Mansfield, C. J. Rex v. Young et al. 1 Burr, 563.

"Discretion without rule ceases to be law, and becomes a most dangerous and tremendous power; when applied to a Court of Justice, it means a sound discretion guided by law; it must be governed by rule and not by humour; it must not be arbitrary, vague and fanciful, but legal and regular."

Duncan, J. Witman v. Ely. 4 Sergt. and Rawle, 265.

"The *Discretion* of a *Judge* is said to be the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion, to which human nature is liable."

Bouv. Dict. Tit. Discretion, and cases cited.

"When it is said that something is left to the *discretion* of the judge, it signifies that he ought to decide according to the rules of equity and the nature of circumstances."

Louis. Code, Art. 3522, No. 13.

"As all judges must derive their authority from the Crown, by some commission warranted by law, they must also exercise their authority in a legal manner."

"And the judges are bound by oath to determine according to the known laws and ancient customs of the realm, and their rule herein must be the judicial decisions and resolutions of great numbers of learned, wise and upright judges upon a variety of particular facts and cases, and not their own arbitrary will and pleasure."

2 Bouv. Bac. Abr. "Courts," page 620, and cases cited.

"Courts are organized and established to administer the laws of the land. In their decisions they are bound to observe and protect those paramount laws which they are sworn to support."

Per Lumpkin, J. Flint River Steamboat Co. v. Foster. 5 Ga. 204.

"For though in many other countries everything is left in the breast of the judge to determine, yet with us he is only to *declare* and *pronounce* not to *make* or *new model* the law."

3 Black Comm. C. 22. Sec. 327.

IV.

Every *Mode* of *Trial* known to the common law, and under the supervision of a Court, is ordinarily characterized as a civil, criminal, or mixed proceeding. And any proceeding which comprehends within itself what is technically called a *Charge*, and which involves a determination of the *Guilt* or *Innocence* of a party, may be justly regarded as a criminal proceeding.

A proceeding is clearly *criminal in its nature*, which occasions any deprivation of a party's rights, for official misconduct or other legal *offence*. Although the object of the proceeding be only for the purpose of working a forfeiture of some office of Honor, Trust or Profit, other Estate, Property or Liberty, and not for the purpose strictly of punishment, as and for *indictable* crimes or offences.

And the proceeding is no less *criminal or penal in its nature*, because the same party may be further liable, for the same act which works the forfeiture of the particular right or office, to other pun-

ishment provided by the laws of the land or may have already been convicted and punished therefor.

In re Pitman, 1 Curtis C. C. 189.
Ex parte Brown, 1 How. Miss. 303.
State v. Holding. 1 McCord, 379.
Anonymous, 2 Halst. 162.
Const. of Mass. Ch. 1, Sec. 2, Art. 8.
Const. of U. S. Art. 1, Sec. 3.
In re King, 8 Q. B. 129.
Ex parte Brownshall, Cowper, 829.
Stevens v. Hill. 10 M. & Welsby, 28.
Cummings v. State of Missouri. 4 Wall. 320.
James Prescott's Trial, page 130.
John Vinal's Trial. Reported in appendix to Prescott's Case, page 216.
King v. Southerton. 6 East, 127.
Smith's Case, 1 Brod. & Bing. 522.
Smith's Case, 1 Yerger, 228.

"The Senate shall be a Court, with full authority to hear and determine all impeachments made by the House of Representatives, against any officer or officers of the Commonwealth, for misconduct and maladministration in their offices; but previous to the trial of every impeachment, the members of the senate shall, respectively, be sworn truly and impartially to try and determine the *charge in question*, according to evidence."

"Their judgment, however, shall not extend further than to removal from office, and disqualification to hold or enjoy any place of honor, trust, or profit, under this Commonwealth. But the party so convicted shall be, nevertheless, liable to indictment, trial, judgment and punishment according to the laws of the land."

Chap. 1, Sec. 2, Article 8, Constitution of Massachusetts.

"The Senate shall have the sole power to try all impeachments; when sitting for that purpose, they shall be on oath or affirmation.

"Judgment, in cases of impeachment shall not extend further than to removal from office and disqualification to hold or enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment according to law."

Art. 1, Sec. 3. U. S. Constitution.

"With regard to the principles upon which this impeachment is to be conducted, they are to be derived partly from the common law of England, in which most of our legal principles and practices have their origin, and partly from the provisions of our own constitution. The article in the constitution under which this tribunal is organized, provides that the Senate should be a court for the trial of all impeachments made by the House of Representatives against any officer, or officers of this Commonwealth, for misconduct and mal-administration in their offices."

"Some difference of opinion may arise, as to the true construction and effect of these words, *misconduct* and *mal-administration* in office, as they stand in this clause of the constitution, proceeding partly from the ambiguity and want of technical precision in the words themselves, and partly from their connection with the other words in the same paragraph. The latter clause provides, that the party so convicted (i. e. on impeachment,) shall be, nevertheless, liable to indictment, trial, judgment and conviction, according to the laws of the land."

"Perhaps the most reasonable construction of these provisions in the constitution taken together, is, that proceedings by impeachment and by indictment are had *alio intuitu*, designed and intended for *distinct purposes;* the one to punish the *officer*, and the other the *citizen*. It is obvious that a person in official station is bound, in common with all other citizens, to obey the laws of the land, and is answerable to the ordinary tribunals for any violation of them. But the constitution establishes a broad and marked distinction between official delinquency, and offences against social duty. Criminal acts therefore may be committed by an officer, of such a nature as to render him liable to indictment and punishment in the courts of justice, and at the same time being in obvious violation of his official duty, may render him liable to impeachment. Again, other acts may be supposed, which, as breaches of the laws, would render an officer liable to indictment and punishment, but which, not in any way affecting his official character and duty, would not render him liable to impeachment. The position is equally sound, that acts may be committed by a public officer, in direct violation of his official duty which would amount to misconduct and mal-administration in office within the intent of the constitution, and which would consequently render the officer liable

to impeachment, and yet of such a nature that the ordinary tribunals would not take notice of and punish them, in their usual course of proceedings, and, according to the laws of the land, and for which therefore the offender would not be indictable. If this construction be true, an act may be punishable both by indictment and impeachment, or the one, or the other exclusively, according to its nature and circumstances."

Lemuel Shaw (afterwards Chief Justice), one of the Managers of the Impeachment, in James Prescott's case before The Senate of Massachusetts, Page 180.

V.

But, at Common Law, whether a proceeding be criminal or civil, or of a mixed or dual nature, *if it has the character of a judicial proceeding*, some form of legal process adapted to the particular case, must universally be instituted or laid as the foundation of *the* PROCEEDING, notice of the same given, and the opportunity presented to the party to make his defence, and to be legally and regularly tried or heard ere any judgment or order of forfeiture or deprivation of any *freehold office*, or other legal right can lawfully be effected or inflicted, *for any purpose*, by any Tribunal whatsoever, and if in any *essential* particular, *the proceeding* is irregular or defective, *the* CONVICTION will not be by "due process of law" and the judgment will be a nullity.

Rex v. Lediard. Sayers, 6.
The Queen v. Saddlers Co. 10 House Lords' cases, 404.
The Queen v. Smith. 5 Q. B. 621.
In re Monckton. I Moore's Privy Council, 455.
Bowerbank v. Bishop of Jamaica. 2 Moore's P. C. 470.
Smith v. Justices of Sierra Leone. 3 Moore's P. C. 361.
Gahan v. Lafitte. 3 Moore's P. C. 382.
Willis v. Sir G. Gipps. 5 Moore's P. C. 379.
Wildes v. Russell. C. B. 722, Eng. Law Rep. 1866.
Capel v. Child. 2 Crompt. & Jerv. 558.
Rex v. Gaskin. 8 T. R. 209.
Howard v. Gossett. 10 Q. B. 381.
Bonaker v. Evans. 16 Q. B. 162.
Ex parte Ramshay, 18 Q. B. 187.
Ex parte Kining, 4 C. B. 507.
Gorham v. Luckett. 6 B. Munroe, 146.

Murray v. Oliver. 3 B. Munroe, 1.
Greene v. Briggs. 1 Curtis, C. Ct. 325.
Bishop's Crim. Proc. Vol. 1, Sec. 1001.
Broom's Maxims, 3 Lond. Ed. 10.
Sevier's Case, Peck's Rep. 334.
Sheldon v. Newton. 3 Ohio State, 498.
McClure v. Tennesee. 1 Yerger, 223.
United States v. Duane. Wall. c. ct. 141.
Ex parte Heyfron, 7 How. Miss. 127.
Fletcher v. Daingerfield. 20 Calif. 427.
People v. Turner. 1 Calif. 150.
Fisher's Case, 6 Leigh, 619.
Dynes v. Hoover. 20 How. U. S. 82.
James Prescott's Trial, 1821, page 164.
Greenleaf's Trial.
Hunt's Trial.
Copeland's Trial.

Last three cases are reported in appendix to Prescott's Trial, pages 212 to 219.

"When we speak of *proceedings* in a cause, or for the organization of the Court, and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence or law, but of a disregard of the *essentials* required by the Statute under which the Court has been convened to try and to punish an offender for an imputed violation of the law."

Wayne, J., Dynes v. Hoover. 20 How. U. S. 82.
Ditcher v. Denison. 11 Moore's P. C. 324.

"It is essential to a *conviction* that it be founded upon a *proceeding* against a person. It is likewise essential to a conviction, that it be a *judicial act*."

Lord Chief Justice Lee. Rex v. Lediard. Sayers. 6.

"It is a principle of the Common Law, that a party cannot be removed from *office* in which he has a freehold, but for misconduct, and that he is entitled to be heard upon the charges made against him."

Mr. Baron Parke. Willis v. Sir G. Gipps. 5 Moore's Privy Council, Cases, 391.

"No Court can act without giving the party an opportunity of being heard; and where a party has been turned out improperly,

I think that he ought to be placed in the same situation he was before the improper removal took place."

"If a party was actually in office, and was to be removed from it for cause, it seems to be an invariable rule of justice that he should not be condemned unheard, and a Court had no right to assume that he would have no cause to show against his removal."

Per Crompton J., and Lord Chancellor Chelmsford, delivering opinion of the Court, in, The Queen v. The Saddler's Co. 10 House Lords' Cases, 404.

"The sentence of removal from a *freehold office*, ought to be preceded by some *mode of inquiry*, in which the accused should have the opportunity of bearing a part. That important general principal, which was so strenuously asserted, by Lord Kenyon, in Rex v. Gaskin. 8 T. R. 209, has been often held sound, and never questioned. We do not think its application is excluded because the charge rests on the minister's personal observation, inasmuch as that is not inconsistent with the disproof of criminal motives and intentions, with the mitigation to which other facts might possibly entitle the accused, or with condonation of the offence. This principle appears to us valuable to the Judge, whom it tends to secure against yielding too hastily to his own first impressions, *while we think it indispensable for the sake of the party charged in all cases, to the due execution of every judicial power.*"

Lord Denman, C. J., delivering opinion of the Court, in, The Queen v. Smith. 5 Q. B. 621.

In Gorham v. Luckett, the Court say, "If the question were more doubtful than it is, we ought to lean against the recognition of a mere arbitrary power, and to carry out the pervading principle of our system, that the tenure of good behavior is a better guarantee for official good conduct than the subjection of the officer to the arbitrary will or caprice of any body of men."

"The power of removing Jailers, as vested in the county Courts, not being arbitrary or merely discretionary, but to be exercised only on the specific ground of neglect or breach of duty, it is next to be considered whether this power is *judicial*, and it would seem to be going far towards proving it to be judicial, when, being vested in a Court, it is shown not to be an arbitrary or discretionary

power, but one limited to particular grounds, and therefore not dependent upon the will or mere discretion of the Court, but upon its judgment, as to the existence of the particular grounds."

"The mere act of removal, as well as the act of appointment, may, when abstractly considered, be executive or ministerial in its nature. But if the power of doing either, being vested in a Court, is regulated by rules of law, so as to involve a determination of facts and law by which its propriety may be tested, and so that its improper exercise necessarily violates the rights of some individual, which are fixed by law and involved in the act of appointment or removal, it would seem that whatever may be the essential nature of the power when simply considered, it is when placed under these conditions a judicial power."

"In Isaacs v. Taylor, 3 Dana, 600, it was decided where a party has an interest, though not beneficial, it is one which the law recognizes and protects, and the law recognizing the interest of a guardian as one which may be violated by an arbitrary removal, the law protects it by requiring that there shall be cause of removal, and notice to the guardian, and that by this requisition implied from the general principles of the law, the power of removal in the case of a guardian is made judicial, and the act of removal brought within the revisory jurisdiction of this Court."

"How much stronger are the grounds for coming to a like conclusion in this case, where the office is one of profit, where the jailer has a beneficial interest in it — where that interest and his right to the office are protected, not by implication from general principles, but by making him removable for neglect of duty only, where his duty is, in a general sense at least, prescribed by law, and where the only question left to implication is, whether as he is only removable upon the establishment against him of facts amounting in law to a neglect of duty, he is not entitled to notice and an opportunity of defence."

"In 3 B Munroe, 1 Murray *et ux* v. Oliver, the Court say, 'Administration of the estates of intestates, and the right to such administration being regulated by law, the removal of an administrator by a county court is necessarily a judicial act, and is therefore revisable by this court, under the Constitution and Statutes of Kentucky.' And because the record did not show any citation to, or appearance by, the administrator or the administratrix who had

been removed, the order removing them was held erroneous an void."

"The removal of a clerk by this court for breach of good behaviour is unquestionably a judicial act; and why is not the removal of a jailer by the county court for the same reason, a judicial act, to be exercised only under a judicial power, and in a judicial mode?"

"The jailer has a legal right to hold his office until removed for breach of duty. Why is not the power of determining that he has been guilty of such breach, and of removing him therefor, a judicial power?"

"But even if it should be assumed that the grant of full power to remove whenever it shall appear to them that the jailer has been guilty &c., imports that their judgment of his guilt is to be conclusive, it certainly does not import that they may remove without adjudging him guilty; nor that in ascertaining his guilt, involving as it does both fact and law, they do not act as judges."

"On the contrary the clear import of the clause is that the removal is only to be the consequence of its *appearing to the court* that the jailer is *guilty*, which implies that there shall be in *some form* a *charge*, a *trial* and a *conviction*, and thus denotes with peculiar force that in removing a jailer the court is intended to act judicially. And even if its judgment of guilt were conclusive this would not authorize it to remove without such *judgment* nor necessarily oust this court of its jurisdiction to enforce a fair trial."

Marshall J., delivering opinion of the court, in Gorham v. Luckett. 6 B. Munroe, 163, 166.

"It is a common principle in every case which has in itself the *character of a judicial proceeding* that the party against whom the judgment is to operate should have an opportunity of being heard. In our courts of law you cannot obtain a judgment against a party without entering an appearance for him so that it shall seem as if he had appeared. He either does actually appear or else you enter an appearance for him according to the act of parliament expressly made for that purpose, and made because it is considered an invariable maxim of law that you cannot proceed against a party without his having the opportunity of being heard, and without his appearing *in court* before a judgment shall be pronounced against him."

"In the case of proceedings before Magistrates on summary convictions, if the conviction does not state either that the party was summoned or that he appeared the conviction is bad. If you remove a corporator and it turns out he was not summoned, however gross and flagrant his misconduct may have been, he is entitled to be restored, and I know of *no case* in which you are to have a *judicial proceeding*, by which a man is to be deprived of any part of his property without his having an opportunity of being heard."

Bailey B., concurring with the other Judges *seriatim* in Capel v. Child. 2 Crompt. & Jerv. 579.

"No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an *offence* by a *judicial proceeding* until he has had a fair opportunity of *answering the charge against him*, unless indeed the Legislature has expressly or impliedly given an authority to act without that necessary preliminary."

"This is laid down in Bagg's case. 11 Rep. 93, b, 99 a. Dr. Bentley's case, 1 Strange, 557. Rex v. Benn, 6 T. R., 198. Harper v. Carr, 7 T. R., 270, and Rex v. Gaskin, 8 T. R. 209, and many other cases concluding with that of Capel v. Child, 2 C. & J., 558, in which Bayley B. says, 'he knows of no case in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property without his having an opportunity of being heard.'"

"That case was a very strong one and shows how firmly the court adhere to that great principle of justice that in every judicial proceeding, '*Qui aliquid statuerit parte inaudita altera, æquum licet statuerit, non æquus fuerit.*'"

Parke B., delivering the opinion of the Court in Bonaker v. Evans. 16 Q. B. 171.

In *ex parte* Ramshay, 18 Q. B. 187, Lord Campbell, C. J., delivering the opinion of the Court, after reciting the act of Parliament giving the Chancellor jurisdiction to remove, etc., says, "By a formal instrument under the hand and seal of George William Frederick, Earl of Carlisle, Chancellor of the Duchy of Lancaster, within which the whole of the district of

this County Court lies, Mr. Ramshay, before the appointment of Mr. Pollock, was removed for inability and misbehaviour. We are of opinion that this instrument is not absolutely conclusive, that the Chancellor, in the exercise of the authority to dismiss from the office, is, in the language of the judges in Rex v. Warren, 1 Cowper, 370, 'subject to the control of this Court,' and that (as is there said) we may inquire into the cause and the manner of amotion. We cannot insist that the instrument of removal shall set out all the proceedings instituted in order to the removal, with the specific charges showing inability or misbehaviour, or the evidence adduced to support these charges. The instrument being drawn up in the words of the act of Parliament, we may presume that the Chancellor has duly exercised his jurisdiction till the contrary is proved. But we think that it would have been open to Mr. Ramshay to show that he was removed without notice of any charges against him, or without an opportunity of being heard in his defence, or that no evidence was adduced to support the charges, or that the complaints against him were not for inability or misbehavior in his office, and were of such a nature that if proved or admitted they could not disqualify him from his office, or amount to *inability* or *misbehaviour* within the meaning of the act of Parliament. Upon such affidavits we think that we should have been bound to grant a rule to shew cause for a *quo warranto*, with a view to his being afterwards restored to his office, from which he had been illegally removed."

"We are to see that judges and functionaries, vested with judicial authority, do not exceed their jurisdiction. The Chancellor has authority to remove a judge of a county Court only on the implied condition prescribed by the principles of eternal Justice, that he hears the party accused. He cannot legally act upon such an occasion without some evidence being adduced to support the charges, and he has no authority to remove for matters unconnected with inability or misbehaviour in the office of County Court Judge. Where the party complained against has had a fair opportunity of being heard, where the charges, if true, amount to inability or misbehaviour, and where evidence has been given in support of them, we think we cannot inquire into the amount of evidence, or the balance of evidence, the *Chancellor, acting within his jurisdiction*, being the constituted judge upon this subject."

"Looking to the affidavits on which the motion was made they appear to us to be insufficient te rebut the presumption that the removal was regular and rightful. The affidavits very strongly assert Mr. Ramshay's uniform good conduct as a judge as well as his ability, and they particularly seek to justify his conduct on some occasions where he was supposed to have acted improperly, as in fining the editor of a newspaper for a contempt of Court. But Mr. Ramshay does not say, *that grave charges of misbehaviour as a judge were not brought against him, or that he had no notice of these charges, or that he had not a fair opportunity of being heard upon them, or that evidence was not adduced to support them.* Consistently with these affidavits the proceedings may have been regularly conducted, and there may have been evidence before Lord Carlisle sufficient to support the charges and to warrant the judgment. Motion denied."

"I take it that this is a *Court*, that the Respondent is brought here to be *tried;* that you are his *judges;* and that the rule of your decision is to be found in the constitution and the law. I take it for granted that this court feels itself bound by the constitution and the law; and I shall therefore proceed to inquire whether these *articles*, or any of them, are sustained by the constitution and the law. I take it to be clear, that an impeachment *is a prosecution for the violation of existing laws;* and that the *offence*, in cases of impeachment, must be set forth substantially in the same manner as in indictments, — I say substantially, for there may be, in indictments, certain technical requisitions, which are not necessary to be regarded in impeachments."

"An impeachment, it is well known, is a *judicial proceeding*. It is a *trial;* and conviction in that trial is to be followed by forfeiture and punishment. Hence, the authorities instruct us, that the rules of proceeding are substantially the same as prevail in other criminal proceedings. 2 Wooddeson, 611; 4 Bl. Comm. 259; 1 H. P. C. 150. 1 Chitty's Criminal Law, 169."

"There is, on this occasion, no manner of *discretion* in this Court, any more than there is in other cases, in a Judge or a juror. It is all a question of law and evidence."

"This being, then, a judicial proceeding, the first requisite is, that the Respondent's OFFENCE *should be fully and plainly, substantially and formally described to him.* This is the express requisition of the

Constitution. Whatever is necessary to be proved, must be alleged, and it must be alleged with ordinary and reasonable certainty."

"In the next place, the matter of the charge must be the breach of some known and standing law; the violation of some positive duty. If our Constitutions of Government have not secured this, they have done very little indeed for the security of civil liberty."

"If impeachment be not under the rule of the constitution and the laws, then may we tremble, not only for those who may be impeached, but for all others. If the full benefit of every constitutional provision be not extended to the respondent, his case becomes the case of all the People of the Commonwealth. The constitution is their constitution. They have made it for their own protection, and for his amongst the rest. If he be condemned without having his offences set forth, in the manner which they, by their constitution have prescribed; and proved, in the manner which they, by their laws have ordained, then not only is he condemned unjustly, but the rights of the whole people disregarded. For the sake of the people themselves, therefore, I would resist all attempts to convict by straining the laws or getting over their prohibitions. I hold up before him the broad shield of the constitution: if through that he be pierced and fall, he will be but one sufferer in a common catastrophe."

Daniel Webster in his argument as counsel for James Prescott, at his trial before Senate of Massachusetts, A. D. 1821, Pickering & Gardner's Report of Trial, pages 164, 165, 178.

And Lemuel Shaw (afterwards Chief Justice of Massachusetts), one of the managers, in his reply, observes, "We cheerfully accede to the proposition that this is a Court of Justice, of criminal jurisdiction, possessing all the attributes and incidents of such a Court. We agree that here is no question of expediency, of fitness or unfitness; but one of judicial inquiry, of guilt or innocence. We make no appeal to the will or discretion, but address ourselves wholly to the understanding, the judgment and the consciences of the Judges of this Honorable Court."

"It has not been, and it cannot be contended, that in its decisions and adjudications this Court is not governed by established laws. These may be either positive and express, or they may depend upon reasoning and analogy. It would be idle to expect a rule applicable

to every case in the text of the Statute book. Laws are founded on certain general principles, and the relations of men in society. It is the province of this Court, as well as of all other judicial tribunals, to search out and apply these principles to the *particular cases* in judgment before them; and in doing this, in addition to general reasoning, they will avail themselves of all the aid to be derived from books of established authority in the principles of the common law, the decisions of eminent judges and the analogous provisions in the codes of other countries."

"Laws thus derived, necessarily resulting from the nature and constitution of society, are of the highest authority, and when discovered, are binding upon the judgment and the consciences of judges, from the obligation of which they can no more escape, than the planets from the operation of those physical laws by which they are governed and regulated."

"The object of the impeachment is to inquire into, and to decide upon, the official misconduct of the accused, and the only reasonable rule with regard to form is, that the articles shall set forth all those acts, which constitute such official misconduct, with sufficient certainty and precision to enable the Court and the accused to understand the nature and extent of the offence charged."

Same case, page 182.

"Before a Court can pronounce the *sentence of the Law* upon an offender, the fact of his guilt must *judicially* appear."

Scott, J. Ex Parte Fisher. 6 Leigh. 619.

"It is against every principle of justice that judgment should be pronounced, not only without giving the party an opportunity of adducing evidence, but without giving him notice of the intention of the judge to proceed to pronounce the judgment."

"Wherever power is given to pronounce a judgment, according to every principle of law and equity, such judgment could not be pronounced, or if pronounced could not for a moment be sustained unless the party in the first instance had the opportunity of being heard in his defence, which in this case he had not, and not only *no charge is made against him which he had an opportunity of meeting, but he has not been summoned that he may meet any charge.*"

Lord Lyndhurst, C. B., concurring with the other judges, in Capel v. Child. 2 Crompt. and Jerv. 574-577.

"The legal presumption is that all violations of the Constitution are prejudicial. Experience teaches, and all history shows that there is but one mode of preserving free institutions in their purity, and that is by resisting the first attempt to overleap the prescribed boundary."

Collier, J., delivering opinion of the Court. In re Dorsay. 7 Porter, Ala. 387.

"Experience has shown that the liberty of the subject with which we are intrusted is involved in the accuracy *in point of form* of legal proceedings; for that reason accuracy is required, and in that view of it, it is no paradox to say that *form* becomes *substance*."

Per Coleridge, J. Howard v. Gossett. 10 Q. B. 381.

"Surely it may be assumed as a *postulate*, that a Court of Justice in adjudicating upon the rights of the citizen, should do, and can have power to do, nothing which is *irregular, or vain, or useless*."

Daniel J., Mitchell v. Harmony. 13 How. U. S. 146.

"The right of every person to go unpunished until not only the crime has been committed but he has been *formally* convicted of it after making every defence which any other person is entitled to make is one of the main pillars on which rest our liberty and our security in the pursuit of happiness."

Bishop's Crim. Procedure, Vol. 1, Sec. 1001.

"For the law would rather suffer a particular offence to escape without punishment, than permit a violation of its fixed and positive rules."

Broom's Maxims, 3 Lond. Ed. 10.

And Judge Pitman, in Greene v. Briggs, 1 Curtis C. Ct. Rep. 337, quotes Lord Coke in his commentary upon the 29th chapter of *Magna Charta* (2 Inst. 48–53), "No man destroyed," etc. "Every oppression against law, by color of any usurped authority is a kind of destruction, for *quando aliquid prohibiter, prohibiter et omne, perquod devenitur ad illud;* and that is the worst oppression that is done by *color of justice*."

VI.

The proceeding by a Court to punish for a *contempt* committed to itself, in the face of the Court, by laying an ORDER on the record *instanter*, adjudging a contempt to have been committed in *facie curiæ*, and, without a hearing, imposing a fine or ordering a party into custody for the alleged contempt, although in derogation, has been held not to be in violation of *Magna Charta*, and sanctioned wholly upon the principle of self-preservation, and as a power necessary to be exercised by all Courts, in order to preserve the authority, dignity and decorum of the Court, and to secure the due administration of justice; and the nature of which power at common law extends no further than the imposition of a fine, or the holding of the party in custody until the adjournment, *sine die*, of the tribunal which ordered the commitment, or for some definite period of time. And such a proceeding is not regarded in law as an original judicial proceeding, but as the application of an incidental power of a Tribunal, while in the *lawful* exercise of its jurisdiction and discretion.

Anderson v. Dunn. 6 Cranch, 231.
United States v. Hudson. 7 Cranch, 34.
Lining v. Bentham. 2 Bay's. Rep. 1.
Heard v. Pierce. 8 Cush. 338.
Watson v. Bodell. 14 M. & W. 70.
Ex Parte Clarke. 2 Q. B. 780.
Carus Wilson's case. 7 Q. B. 1012.
United States v. Dodge. 2 Gall. 313.
Hollingsworth v. Duane. Wallace, C. Ct. 78, 145.
In re Judson. 3 Blatchf. 148.
Piper v. Pearson. 2 Gray, 120.
4 Black. Comm. 286.
Ex Parte Thatcher. 2 Gil. Ill. 167.
In re Mulock. 4 Amer. Law Reg. (N. S.), 298.
Gossett v. Howard. 10 Q. B. 412.
2 Hale, P. C. 122.
2 Hawk. P. C. Chap. 22, P. 206, and cases cited.
The King v. James. 5 Barn. & Ald. 894.
Van Sandau v. Turner. 6 Q. B. 773.
Ex Parte Fernandez. 10 C. B. (N. S.) 330.
The King v. Davison. 4 Barn. & Ald. 329.
Long Wellesley's Case. 2 Russ. & Mylne, 639.
Dill v. Murphy, 1 Moore's P. C., N. S. 487.
Kielly v. Carson. 4 Moore's P. C. 63.

Fenton v. Hampton. 11 Moore's P. C. 347.
Gorham v. Luckett. 6 B. Mun. 638.
Burdett v. Abbott. 14 East, 1.
In re Elsam. 3 B. & C. 597.
Dicas v. Lord Brougham. 6 Car. & Payne, 240.

And this power of a Court to punish for contempt *instanter* in open Court or upon rule and hearing in an *original* proceeding for contempt, has been held not to extend to the power of removing a party from his *freehold office*, as a punishment for the contempt.

Austin's Case. 5 Rawle, 191.
People v. Turner. 1 Calif. 144, 152.
People v. Turner. 1 Calif. 188, 190.
Fletcher v. Daingerfield. 20 Calif. 427.
State of Iowa v. Start. 7 Iowa, 499.
Fisher's case. 6 Leigh. 619.
Dr. Bentley's case. 1 Strange, 566.
Gossett v. Howard. 10 Q. B. 412, note E.
Smith v. Justices of Sierra Leone. 3 Moore's Privy Council, 361.
In re Downie and Arundell. 3 Moore's P. C. 414.
Smith v. Justices of Sierra Leone. 7 Moore's P. C
See, Ex Parte Tillinghast. 4 Pet. 108.
Jackson v. State. 21 Texas 668.
Mathis v. State. 26 Ala 252. Ex Parte Ar

And if a Court in Massachusetts, where the r
law prevail, should undertake to punish a party
Court in any other way than by fine or imprisonm
ment depriving him of any *freehold office*, it woul
tion of Article 26, of the Declaration of Rights, which pro
that "no magistrate or Court of law shall inflict cruel or u
punishments," and the judgment, though the proceeding in a
respects had been regular, would be void.

In the Matter of Wallace an Attorney.
4 Monei P.C.(N.S.) 140.

VII.

ANALYSIS of the *essential* and *fundamental* elements or requisites of *every judicial proceeding*, affecting any right to "life, liberty, or property," at the common law, and necessary to satisfy the requirements of *Magna Charta*, or the principles of *natural justice*.

There must be some form of ORIGINAL PROCESS, or ORIGINAL PROCEEDING, or ORIGINAL ORDER of COURT filed or made

VI.

The proceeding by a Court to punish for a *contempt* committed to itself, in the face of the Court, by laying an ORDER on the record *instanter*, adjudging a contempt to have been committed in *facie curia*, and, without a hearing, imposing a fine or ordering a party into custody for the alleged contempt, although in derogation, has been held not to be in violation of *Magna Charta*, and sanctioned wholly upon the principle of self-preservation, and as a power necessary to be exercised by all Courts, in order to preserve the authority, dignity and decorum of the Court, and to secure the due administration of justice; and the nature of which power at common law extends no further than the imposition of a fine, or the holding of the party in custody until the adjournment, *sine die*, of the tribunal which ordered the commitment, or for some definite period of time. And such a proceeding is not regarded in law as an original judicial proceeding, but as the application of an incidental power of a Tribunal, while in the *lawful* exercise of its jurisdiction and discretion.

Anderson v. Dunn. 6 Cranch, 231.
United States v. Hudson. 7 Cranch, 34.
Lining v. Bentham. 2 Bay's. Rep. 1.
Heard v. Pierce. 8 Cush. 338.
Watson v. Bodell. 14 M. & W. 70.
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Hollingsworth v. Duane. Wallace, C. Ct. 78, 145.
In re Judson. 3 Blatchf. 148.
Piper v. Pearson. 2 Gray, 120.
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Fenton v. Hampton. 11 Moore's P. C. 347.
Gorham v. Luckett. 6 B. Mun. 638.
Burdett v. Abbott. 14 East, 1.
In re Elsam. 3 B. & C. 597.
Dicas v. Lord Brougham. 6 Car. & Payne, 240.

And this power of a Court to punish for contempt *instanter* in open Court or upon rule and hearing in an *original* proceeding for contempt, has been held not to extend to the power of removing a party from his *freehold office*, as a punishment for the contempt.

Austin's Case. 5 Rawle, 191.
People v. Turner. 1 Calif. 144, 152.
People v. Turner. 1 Calif. 188, 190.
Fletcher v. Daingerfield. 20 Calif. 427.
State of Iowa v. Start. 7 Iowa, 499.
Fisher's case. 6 Leigh. 619.
Dr. Bentley's case. 1 Strange, 566.
Gossett v. Howard. 10 Q. B. 412, note E.
Smith v. Justices of Sierra Leone. 3 Moore's Privy Council, 361.
In re Downie and Arundell. 3 Moore's P. C. 414.
Smith v. Justices of Sierra Leone. 7 Moore's P. C. 174.
See, Ex Parte Tillinghast. 4 Pet. 108.
Jackson v. State, 21 Texas 668
Mathis v. State 36 Ala 252. Ex Parte Bradley U S Supreme Ct. 1869.

And if a Court in Massachusetts, where the rules of the common law prevail, should undertake to punish a party for a contempt of Court in any other way than by fine or imprisonment, as by a judgment depriving him of any *freehold office*, it would be in plain violation of Article 26, of the Declaration of Rights, which provides, that "no magistrate or Court of law shall inflict cruel or *unusual* punishments," and the judgment, though the proceeding in all other respects had been regular, would be void.

In the Matter of Wallace an Attorney & Barrister
4 Moore's P.C. (N.S.) 140.

VII.

ANALYSIS of the *essential* and *fundamental* elements or requisites of *every judicial proceeding*, affecting any right to "life, liberty, or property," at the common law, and necessary to satisfy the requirements of *Magna Charta*, or the principles of *natural justice*.

There must be some form of ORIGINAL PROCESS, or ORIGINAL PROCEEDING, or ORIGINAL ORDER of COURT filed or made

of record *in court* as the beginning or foundation, and as the first element or premise on which to support the judgment of the Law.

2 Black. Comm. Book 3, cs. 18 and 19.
Green v. Briggs. 1 Curtis C. Ct. 330.
Devane v. Calching. 2 How. Miss. 884.
Martin v. Marshall. Hobart, 63.
Perkins v. Proctor. 2 Wils. 386.
Peter v. Stafford. Hobart, 244.
Capel v. Child. 2 Crompt. & Jerv. 577.
Bonaker v. Evans. 16 Q. B. 163.
Lechmere Charlton's case, 2 Mylne & Craig, 323.
Seal v. Dossee. 9 Moore's P. C. Rep. 411.
Ditcher v. Denison. 11 Moore's P. C. Rep. 324.
Pierrot v. Hill. 3 Wils. 58.
Middleton v. Price. 1 Wils. 17.

"The original writ is the beginning and foundation of the suit.

"When a person hath received an injury and thinks it worth his while to demand a satisfaction for it, he is to consider with himself or take advice what redress the law has given for that injury, and thereupon is to make application or suit to the Crown, the fountain of all justice for that particular specific remedy.

"This is directed to an officer commanding the party to appear *in Court* and answer the accusation against him. Whatever the sheriff does in pursuance of this writ he must certify to the Court of Common Pleas, together with the writ itself, which is the foundation of the jurisdiction of that Court, being the King's warrant for the judges to proceed to the determination of the cause.

"For it was a maxim introduced by the Normans, that there should be *no proceedings* in Common Pleas, before the King's Justices *without* his original writ, because they held it unfit that the Justices being only the substitutes of the Crown, should take cognizance of anything but what was thus expressly referred to their judgment."

3 Black, Comm. Sec. 273.

"Without process which is the foundation of jurisdiction, the jurisdiction cannot exist."

Curtis, J. Greene v. Briggs. 1 Curtis, C. Ct. 350.

"Without a writ of error or an appeal, the High Court will have no jurisdiction of a case, even though the record be filed and a citation served."

Per Curiam. Devane v. Calching. 2 How. Miss. 884.

"Every step proceeds upon the sufficiency of the requisition. If that foundation stone is removed, I think everything built upon it is to be considered as removed also."

Bayley, B. Capel v. Child. 2 Compt. & Jerv. 577.

In the case of Martin v. Marshall, Hobart 63, it was decided by the court, that the law knows no such thing as *oral* process, and that "the court must have jurisdiction of the process, as well as the person." The law of this case is reaffirmed in Perkins v. Proctor, 2 Wils. 386; and both cases are cited as authorities by Curtis, J., in Greene v. Briggs. 1 C. Ct. Rep. 350.

"The levying a *plaint* against a party is like the suing out of an *original*, which is not *of record* till it be returned in the court."

Hobart, C. J., delivering opinion of the court, Peter v. Stafford. Hob. 244.

There must be a SUFFICIENT CHARGE or ALLEGATION *in writing* annexed to or forming a part of the original process, or embodied in and constituting the beginning or foundation of the original judicial proceeding, as in the case of Petitions, Complaints, Articles of Impeachment, Bills of Indictment, Proceedings before Courts Martial, Informations, Libels, Written Motions, and Affidavits, or which must be filed as a separate pleading in the case.

Greene v. Briggs. 1 Curtis C. Ct. 325, 330.
1 Vol. Bishop's Criminal Procedure, Sec. 41.
Buckley's Lessees v. Blackwell's Heirs. 10 Ohio, 512.
Rex v. Fuller. 1 Lord Raym. 509.
Rex v. Trelawney. 1 T. R. 222.
Comw. v. Phillips. 16 Pick. 212.
2 Hawk. P. C. Book 2, Chap. 25, Sec. 60.
Rex v. Middlehurst. 1 Burr. 399.
The King v. Williams. 1 Leach C. C. 534, 4th Ed.
Hartman v. Comw. 5 Barr, 60, 66.
Comw. v. O'Donnell. 1 Allen, 594.
Rex v. Richardson. 1 Burr. 518.
Clegg's case. 2 Burr. 726.
Rex v. Holland. 5 T. R. 607.
Williams v. Bishop of Salisbury. 2 Moore's P. C., N. S. 376.

The Queen v. Owens. 15 Q. B. 476.
The King v. Shaw. 12 Mod. 413.
The King v. Horne. Cowp. 633.
Fisher v. McGirr. 1 Gray 1.
Chapman's case. 11 Ohio, 430.
3 Black. Comm. Sec. 292.
4 Black. Comm. Sec. 287.
Regina v. Baynes. Salk. 680.
Ex parte Ramshay. 18 Q. B. 187.
Bowerbank v. Bishop of Jamaica. 2 Moore's Privy Council, Rep. 470.
Rex v. Chapman. Sayers. 203.
The Queen v. Smith. 5 Q. B. 621.
Willis v. Gipps. 5 Moore's P. C. 379.
Cloete v. The Queen. 8 Moore's P. C. 484.

"Where the law requires that the accused be informed of the nature and cause of the accusation, there being no accusation whatever against the plaintiff, how can he be said to be informed of its nature and cause? Where the Constitution requires that the accused should be informed of the nature and cause of the accusation it clearly implies that there is to be an accusation against him. In this case, it stands in the same article which demands a conformity to 'the law of the land,' that is, 'due process of law,' and should be interpreted as requiring that certainty which the common law has deemed essential to the protection of the accused."

Curtis, J., commenting on Constitution of the State of Rhode Island. Green v. Briggs. 1 C. Ct. Rep. 325-330.

"The necessity for requiring parties who are seeking to establish claims against one another, to present in writing the particulars of their claims is obvious, since otherwise the Judge cannot have any foundation on which to proceed in pronouncing judgment upon the case submitted to him. But equally obvious also is it, that on other grounds, even more than on this one, rests the duty of written and distinct allegation; for, the world being possessed of the art of writing, no man should be called to stand his trial on any charge whatever, before any human power, until such charge has been so set forth as to leave no doubt concerning its nature and its limits, and leave it impossible for the accuser to vary it in the course of the hearing. Whatever comes short of this, comes short of that justice, which every individual, however erring, is entitled to receive from his fellows. And the doctrine concerning this writ-

ten charge is, that it must be made as distinctly and directly as the nature of the case, in reason will permit."

1 Vol. Bishop's Crim. Procedure, Sec. 41.

"Suppose a law authorized a criminal prosecution without any complaint. In such case there could be no doubt that the whole proceeding would be absolutely void."

"I think it would be difficult to make any distinction between no complaint, and one which does not satisfy the requisition of the Constitution, which therefore is no *legal* complaint, and is not 'due process of law' within the definition of Lord Coke of the words 'law of the land' in *Magna Charta*."

Curtis, J. Greene v. Briggs. 1 Curtis, C. Ct. Rep. 335.

"It is laid down in 3 Inst. 41, that although the words of a statute, by which an offence is described, are general, the description of an offence in an *indictment* must be *particular*, for that otherwise the party indicted will not know what charge he is to defend himself against. The description of an offence in a *conviction* ought to be quite as particular, or perhaps more so, as in an indictment, because a conviction is a *summary proceeding*."

Lord Ryder, C. J. Rex. v. Chapman. Sayers, 203.

"Mr. Adam argued that three things ought to concur in *every criminal proceeding*; first, That the party accused should be apprised of the charge he is to defend; secondly, That the Court might know what judgment was to be pronounced according to law; and thirdly, That posterity might know what law is to be derived from the record. These are general propositions to which I assent."

Lord Kenyon, C. J. Rex v. Hollond. 5 T. R. 607.

"Wherever the charges are of a criminal nature, it is necessary that the accusation should be stated with precision and distinctness in the pleadings."

Lord Chancellor. Williams v. Bishop of Salisbury. 2 Moore's P. C., N. S. 376.

"Where the "*complaint*" is the only basis of the proceedings, the only statement of the offence, where it is made to a court of record, not with a view to an arrest, examination and commitment, but with a view to a *judicial investigation*, *trial* and *conviction*, as a case within its admitted jurisdiction, when in form and substance the conviction follows and affirms the matter of the complaint, and regu-

ates the judgment to be entered, it is required, as well by the rules of the common law as by the express requisition of the declaration of rights, that such complaint shall be in a reasonable degree certain, both in substance and in form."

Shaw, C. J. Comw. v. Phillips. 16 Pick. 211.

"Every man has the right to have the accusation embodied in a methodical and legal form, otherwise he will be unable to prepare his defence to resist the charge."

Pr. Wood J. Buckley's lessees v. Blackwell's heirs. 10 Ohio, 512.

"The *charge* must contain such a description of the crime that the defendant may know what crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusion of *guilty* or *not guilty* upon the premises delivered to them; and that the Court may see such a definite crime, that they may apply the punishment which the law prescribes."

Lord Chief Justice DeGray, in delivering the unanimous opinion of all the judges, upon a question put to them by the House of Lords, in the case of the King v. Horne. Cowp. 632. See Chitty's Crim. Law, vol. 1, p. 169, note.

"The charge should be set forth with proper and sufficient certainty, and contain every ingredient necessary to constitute the offence, leaving nothing to mere inference or intendment. 'A conviction,' to use the words of Lord Holt, must be certain and not taken by collection."

Rex. v. Fuller. 1 Lord Raym. 509. Rex v. Trelawney. 1 T. R. 222.

"The charge must be laid positively and not by way of recital, and the want of a direct allegation of any thing material in the description of the substance, nature or manner of the crime or offence cannot be supplied by any intendment or implication whatsoever."

2 Hawk. P. C., Book 2, Chap. 25, Sec. 60.
Rex. v. Middlehurst. 1 Burr. 399.

"The law in criminal cases requires the utmost precision, and will not permit a fact on which the life or liberty of a person depends to be made out merely by inference."

Ashhurst, J., delivering opinion of the twelve Judges in The King v. Williams. Leach, C. C. 534, 4th Ed.

"Precision in the description of the offence is of the last importance to the innocent, for it is that which marks the limits of the

accusation and fixes the proof of it. It is the only hold he has on the jurors, judges as they are of the fact and the law, or on an *insubordinate judge*, who, confiding in his superior wisdom, refuses to conform to any general standard of decision, when his judgment cannot be reached by a writ of error."

Gibson, C. J. Hartman v. Comw. 5 Barr, 60, 66.

"In my judgment there is serious cause of alarm, when in a Court of this character accusations are brought forward, so exceedingly loose and indefinite, so little resembling what we are accustomed to hear in the ordinary courts of criminal jurisdiction. The offence in this article, whatever it may be, instead of being charged and stated in ordinary legal language, is thrown into the form of a *narrative*. A *story* is written down at large with every imaginable circumstance of aggravation, likely to strike undistinguishing minds, and this *story* thus told is the very *form* in which the article is brought. In short, this article contains whatever is most likely to cause the Respondent to be convicted, before he is heard. For my own part I can conceive of nothing more unjust. Would it be tolerated for one moment in a court of law, I beg to ask, that a prosecutor departing from all the usual forms of accusation, should tell his own story, in his own way, mix up his evidence with his charges, and his own inferences with his evidence, so that the accusation, the evidence and the argument, should all go together? A judge would well deserve impeachment and conviction, who should suffer such an indictment to proceed."

Daniel Webster, in Prescott's Trial, pages 172, 173.

"We cannot support a complaint or indictment by connecting together its different parts so as to eke out an essential allegation, argumentatively, and by inference."

Bigelow, C. J. Comw. v. O'Donnell. 1 Allen, 594.

"A criminal charge, not only according to the rules of the common law, but from the nature of the thing, should at least contain enough to show, *that if true*, the appropriate punishment should be inflicted."

Per Curtis, J. Greene v. Briggs. 1 Curtis, C. Ct. 330.

"If a charge is insufficient, there is no occasion for a man to defend himself."

Rex v. Richardson. 1 Burr. 546.
Clegg's case, 2 Burr. 726.
Regina v. Owens. 15 Q. B. 476.
Cloete v. The Queen. 8 Moore's P. C. 484.

"In the spirit of that principle which presumes innocence until guilt be established, we infer that what is not charged in the indictment does not exist."

Porter J. Mears v. Comw. 2 Grant, Penn. pp. 385, 387.

There must be LEGAL NOTICE of *the* CHARGE and the OPPORTUNITY to make DEFENCE.

Kendall v. United States. 12 Pet. 623.
Rex v. University of Cambridge. 1 Strange, 557.
Rex v. Bailiffs of Ipswich. 2 Salk. 435.
Rex v. Town of Liverpool. 2 Burr. 734.
Rex v. Cambridge. 2 Lord Raym. 1348.
Ewer v. Coffin. 1 Cush. 27.
Queen v. Jailer of Cambridgeshire. 7 A. & E. 489.
Brown v. Webber. 6 Cush. 564.
Herrick v. Smith. 1 Gray, 50.
Woodward v. Tremane. 6 Pick. 354.
Chaffee v. Hayward. 20 How. U. S. 208.
Bowerbank v. Bishop of Jamaica. 2 Moore's Privy Council, 470.

"No Court can, in the ordinary administration of justice, in common law proceedings exercise jurisdiction over a party, unless he shall voluntarily appear, or is found within the jurisdiction of the Court so as to be served with process."

Pr. Thompson, J. Kendall v. United States. 12 Pet. 623.

"The objection, for want of notice, can never be got over. The laws of God and man both give the party an *opportunity to make his defence*, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon *Adam* before *he was called to make his defence*. Adam where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat? And the same question was also put to Eve."

Per Fortescue J. Rex v. University of Cambridge, 1 Strange 557.

"A man ought not to be deprived of his *freehold* without having a proper *opportunity* of *making a defence to the charge* upon which he is removed from it."

Lord Mansfield, C. J. Rex v. Town of Liverpool. 2 Burr 734.

"It is contrary to natural justice that a party should be proceeded against and degraded without being heard, and which cannot be done without *summoning* the party and giving him an opportunity of being heard."

Rex v. Cambridge. 2 Ld. Raym, 1348.

"In speaking of notice in reference to legal proceedings, it is to be inferred a judge refers to a legal notice; such a notice as a Court is competent to direct, and which can be served within its jurisdiction."

Pr. Forbes J. Ewer v. Coffin. 1 Cush. 27.

"The person served with notice should be enabled to see that the notice is really a good and valid one."

Pr. Lord Denman. C. J. Queen v. Jailer of Cambridgeshire. 7 A & E, 489.

"In order to acquire jurisdiction of the person, he must be served with process as required by law, by arrest, attachment and summons, or original summons or otherwise."

Pr. Shaw, C. J. Brown v. Webber. 6 Cush. 564.

"And the summons should contain a full and direct statement of the offence charged, and specify a time when, a place where, and the tribunal before which he is to appear and answer."

Pr. Shaw, C. J. Herrick v. Smith. 1 Gray, 50.

"Nor will knowledge by a defendant of the institution of a cause in court against him, give a Court jurisdiction over his person without service of notice or an appearance."

The Court in Woodward v. Tremane. 6 Pick. 354.

"A party is not bound to appear unless he is legally cited, except for the purpose of moving to dismiss. He knows, or must be presumed to know, whether the notice which the law requires has been served on him or not."

Per Taney, C. J. Chaffee v. Hayward. 20 How. U. S. 208.

Appearance, in construction of law, is the entry of a party's own name, or that of counsel for him, on the docket or record of the Court, in the *proceeding* wherein he is named as a party, and not the mere bodily presence of a person in the room where judicial hearings and trials are held. For a person may be in a court room and yet not *in court*, even though a proceeding be existing on the docket, in which he is named as a party. So also may a party be *in court* although never personally present in the court room. Nor is there any occasion or opportunity for a party to *appear in court*, unless there is a proceeding in court, and manifest on its record in which he can direct his name to be entered and thereby appear.

But a party may, by his own *general appearance* or by that of counsel duly entered on the docket, *waive* the issuing or the service of any process of notice to the person or any defect in its structure or irregularity in its service; for the sole object of process to the person is *notice* of the cause which has been instituted, or which is pending on the record of the Court against him, and which notice the Law requires shall be legally given that he may be properly *brought into Court* and have the opportunity to make defence and to abide the determination of the law; and which right he may relinquish if he will, by entering a general appearance, whereby all defects and irregularities as regards notice are treated in law as waived or as cured by appearance.

3 Black. Comm. 292.
2 Hawk. P. C. B. 2. C. 27, P. 420.
People v. Lamborn. 1 Scam. 123.
Chaffee v. Hayward. 20 How. U. S. 208, and cases cited.
Knox v. Summers. 3 Cra. 496.
Pollard v. Dwight. 4 Cra. 421.
Irvine v. Lowry. 14 Pet. 293.
Gracie v. Palmer. 8 Wheat. 699.

VIII.

Some form of original process adapted to the particular proceeding, having been laid, with a charge or allegations made and legal notice to the party given or appearance entered, and these fundamental and essential elements of a *judicial proceeding* appearing, *prima facie*, to exist, in what is denominated, a *case* upon the docket, there arises, what, in law, is called, *Jurisdiction*, or the lawful power to *hear* and *determine* the particular subject matter which has been referred to the judgment of the Court, and to which the authority of the Court is limited in pronouncing the judgment of the law, provided always the Tribunal be one having a *general* jurisdiction over the subject matter which is contained in the *particular case* before it.

Sheldon v. Newton. 3 Ohio State, 498.
United States v. Arredondo. 6 Pet. 709.
Queen v. Bethell. 6 Mod. 17.
Hopkins v. Comw. 3 Met. 462.
Kendall v. Stokes. 12 Pet. 619.
Thomas v. Hudson. 14 M. & W. 363.
Peter v. Stafford. Hobart, 244.
United States v. Clark. 1 Gall. 500.
Shriver's Lessees v. Lynn. 2 How. U. S. 59.
Mitchell v. Foster. 4 Per. & D. 154.
Same case, 12. A. & E. 472.
3 Bl. Comm. Sec. 25.
Woodruff v. Dickie 5 Robert.

"The District Judge is not the District Court, presiding officer thereof. A court is not a judge court. A judge is a public officer, who, by virtue clothed with judicial authorities. A court is defin[illegible] be a place in which justice is judicially administered. Co. Litt. 58. 3 Bl. Comm. 23. It is the exercise of judicial power by the proper officer or officers at a time and place appointed by law. The officers exist independent of the exercise of such appointed jurisdiction, though the court may not in general be holden independent of its officers. The last position, however, is not always strictly true; for a Court is considered so much as an assemblage of mere abstract judicial powers, to be organized and exercised at stated times and places, that by our laws it may be adjourned without the presence of a judge. There are many powers, which the officers of a court

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Same case, 12. A. & E. 472.
3 Bl. Comm. Sec. 25.

Woodruff v. Dickie 5 Robertson's N.Y. Superior Ct. 624.

"The District Judge is not the District Court, though he is the presiding officer thereof. A court is not a judge, nor a judge a court. A judge is a public officer, who, by virtue of his office, is clothed with judicial authorities. A court is defined to be a place in which justice is judicially administered. Co. Litt. 58. 3 Bl. Comm. 23. It is the exercise of judicial power by the proper officer or officers at a time and place appointed by law. The officers exist independent of the exercise of such appointed jurisdiction, though the court may not in general be holden independent of its officers. The last position, however, is not always strictly true; for a Court is considered so much as an assemblage of mere abstract judicial powers, to be organized and exercised at stated times and places, that by our laws it may be adjourned without the presence of a judge. There are many powers, which the officers of a court

"A court requires merely the presence of a competent number of judges and a clerk, that constitutes the *judex* or incorporeal being called a *court*. It is well settled that unless the Statute in conferring a power, makes a distinction between the powers of a judge and the court, no distinction can exist. All the powers of *the Court* may be exercised by a single judge while sitting as a court, except where the power is confined to the court as a collective body. A single judge may hold a circuit or special term. He can preserve order, punish contempts, hear and decide cases. He does this under the power given to the *court*, and not to him as a judge thereof. And all statutes conferring jurisdiction, give it to the court, and not to the members composing the tribunal."

Monell J. Woodruff *v.* Dickie, 5 Rob., N. Y. Superior, 624.

subject to the power of the Court than every other tract in the county. The devisee was in possession having a life estate in it subject to become a fee-simple on his having heirs lawfully begotten by him. He had no notice of the proceeding and was in no sense a party to it. The *petition* did not pray for a sale of *this* land."

"The Chancellor is authorized to proceed in a summary mode, under the statute for the sale of land in the predicament of the above tract, after the decease of the devisee without heirs. But he can only proceed on the *application* of persons interested. Here was no such application for the sale of this land. The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding. *There was no case before the Court; nothing on which its Judgment could rest.*"

McLean, J., delivering opinion of the Court, in Shriver's Lessees v. Lynn. 2 How. U. S. 59.

"In Mitchell v. Foster, which was Trespass against a magistrate, for a seizure under his distress warrant, under an act which required the summons to be served *ten days at the least* before the time appointed; and it appearing that ten days' notice only and not ten *clear* days' notice had been given, it was held that the conviction was bad, and no defence to an action of trespass for enforcing it. There it was argued by Sir John Campbell, Attorney-General, that the distinction was, that where Justices have a *general* jurisdiction over the subject matter, however erroneous their decision may be in point of law, it is not thereby void *ab initio;* but Williams, J. (concurring in the opinion of the Court), says "the Attorney General contends that it is sufficient if the Justice has jurisdiction *generally* over the subject matter of the complaint; but that is not so, for he must also have jurisdiction over the *particular case* to which the Statute applies." See also case Thomas v. Hudson 14 M. & W. 363, where above case is cited.

Mitchell v. Foster. 4 Per. & D. 154.
Same case. 12 A. & E. 472.

collectively or individually, may and do exercise exclusive of their organization as a court. Indeed what they shall do in either the capacity of an officer or of a court depends exclusively upon the provisions of law. It is not true, therefore, that every act done by the District Judge is, in point of law, the act of the District Court. In his capacity as a *court*, he may try certain offences and suits of common law and admiralty jurisdiction. In his capacity as a *judge* he has no such authority."

Story J., United States v. Clark. 1 Gall. 497.

"In every Court there must be at least three constituent parts the *actor*, *reus*, and *judex;* the *actor* or plaintiff, who complains of an injury done; the *reus* or defendant, who is called upon to make satisfaction for it; and the *judex* or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to have been done to ascertain and apply the remedy."

3 Bl. Comm. Sec. 25.

"Jurisdiction means *cases* and *persons* over whom the Court is to have cognizance and power to the means given to exercise its jurisdiction."

Kendall v. Stokes. 12 Pet. 619.

"The word jurisdiction embraces every kind of judicial action upon the subject matter from the finding the indictment to pronouncing the sentence."

"*To have* jurisdiction, is to have power to inquire into the fact, to apply the law and to declare the punishment, in a regular course of judicial proceeding."

Shaw, C. J. Hopkins v. Comw. 3 Met. 462.

"Wherever a statute gives justices power *generally* to determine a matter at the Sessions it must be according to law and as a Court."

Lord Holt, C. J. Queen v. Bethell. 6 Mod. 17.

"Had the Court Jurisdiction of the tract of land in controversy? At the time the decree was entered, that tract was no more

"The power to hear and determine a cause is jurisdiction; it is '*coram judice*,' whenever *a case is presented* which brings this power into action; if the petitioner state such a case in his petition that on a demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction, whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case is the exercise of jurisdiction conferred by the *filing of a petition containing all the requisites and in the manner prescribed by law*."

Baldwin, J., delivering opinion of the Court, in U. S. v. Arredondo. 6 Pet. 709.

"The power to hear and determine a cause is jurisdiction; and it is *coram judice* whenever a *case* is presented which brings this power into action. But before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; *that such complaint has actually been preferred*, and that such person or thing has been properly brought before the tribunal to answer the charge therein contained. When these appear, the jurisdiction has attached, the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred; and whether determined rightfully or wrongfully, correctly or erroneously, is alike immaterial to the validity, force, and effect of the final judgment, when brought collaterally in question. U. S. v. Arredondo. 6 Pet. 709, 12 Pet. 718."

Ranney, J., delivering opinion of the Court, in 3 Ohio State Rep. 498.

Every Court is *bound*, at its own peril, *to take notice*, ere undertaking to exercise any of the powers *incident* to *jurisdiction*, that there is a *cause* and a *person* legally *before the court*, and apparent on the record, whereby jurisdiction has been acquired, in the particular case.

Jurisdiction appearing *prima facie* to exist, a Court is bound to refrain from the exercise of any of the powers incident to jurisdiction, when its attention is particularly called to the want of facts on which jurisdiction depends.

And no judge is, in duty, bound to exercise any judicial function,

until *a case is presented* demanding the exercise of jurisdictional powers; "*for it is the possession of judicial power which imposes the obligation to exercise it.*"

Devane v. Calching. 2 How. Miss. 884.
Seal v. Dossee. 9 Moore's P. C. 411.
Dewhurst v. Coulthard. 3 Dal. 409.
Beaurain v. Scott. 3 Camb. 388.
The King v. The Chapel Wardens of Milnrow. 5 M. & S. 254.
Calder v. Halket. 3 Moore's P. C. 28.
Houlden v. Smith. 14 A. & E. N. S. 841.
Queen v. Bolton. 1 Q. B. 71.
McCollom v. Eager. 2 How. 61.
Bank of Columbia v. Okely. 4 Wheat. 244.
Owen v. Hurd. 2 T. R. 644.
Gen. Stat. of Mass. C. 158, Sec. 8.

"No person shall be punished for an offence unless duly and legally convicted thereof in a court having competent jurisdiction of the cause and of the person."

General Statutes of Massachusetts, C. 158. "Of the rights of persons accused," Sec. 8.

IX.

It is only after the power of a Court has been started into action, by some proceeding being instituted in court, according to law, that *waiver* of rights by a party to a cause can be made; and this doctrine of waiver is limited in its application to a party's giving up some right which it is in his power to waive, and which it is legally competent for a court to accept, and not to a party's conferring on a court jurisdiction where it has not been conferred by law. And no waiver of rights in a *criminal proceeding* will be presumed against a party that is not expressly shown by the record; nor is it possible for a party to waive any right in a proceeding that is void *ab initio*.

In re the Lord Bishop of Natal. 3 Moore's Privy Council, N. S. 115.
Beaudry v. The Mayor of Montreal. 11 Moore's P. C. 399.
Webster v. Commonwealth. 5 Cush. 404.
Comw. v. Andrews. 3 Mass. 132.
Stephens on Pleading. Heard's, 9th Ed. 139.

Gilliland v. Sellers. 2 Ohio, N. S. 223.
Comw. v. Mahar. 16 Pick. 120.
McCall v. Peachy. 1 Call, 48.
Call v. Mitchell. 39 Maine, 465.
United States v. Hodge. 6 How. 279.
Dewhurst v. Coulthard. 3 Dal. 409.
1 Smith's Ldg. Cases. Crepps v. Durden. Sec. 848, and cases cited.
Buckingham v. McLean. 13 How. U. S. 162.
Bell v. Rail Road Co. 4 Wall. 598.
Shaw v. Spencer et als. Nov. Term. 1868. Mass S. J. Ct.

"Waiver, when applied to the proceedings in an action, may be defined to be the doing of something, after an irregularity committed, and with a knowledge of such irregularity, where the irregularity might have been corrected before the act was done, and it is essential to distinguish a proceeding which is merely irregular, from one which is completely defective and void."

"In the latter case, the proceeding is a nullity which cannot be waived by any laches or subsequent proceedings of the opposite party."

Heard's Ninth Ed. Steph. Pleading. Note z, citing.
Broom's Maxims, 4th Lond. Edit. 139.

"If a Court has no jurisdiction, no *consent* upon which the doctrine of *estoppel* and *waiver* are founded can give jurisdiction."

Shaw, C. J. Webster v. Comw. 5 Cush. 404.

"A defendant cannot even expressly waive a fatal defect in an indictment."

Comw. v. Mahar. 16 Pick. 120.

"In criminal cases, an express relinquishment of a right should appear, before the party can be deprived of it."

Parker, J. Comw. v. Andrews. 3 Mass. 133.

"If then the Bishop of Cape Town had no jurisdiction by law, did he obtain any by contract or submission on the part of the Bishop of Natal? The argument must be, that both parties being aware that the Bishop of Cape Town had no jurisdiction or legal authority as Metropolitan, the appellant agreed to give it to him by voluntary submission. But, even if the parties intended to enter into

any such agreement (of which, however, we find no trace), it was not legally competent to the Bishop of Natal to give, or to the Bishop of Cape Town to accept or exercise, any such jurisdiction."

"Their Lordships, therefore, will humbly report to her Majesty, their judgment and opinion, that the proceedings taken by the Bishop of Cape Town, and the judgment or sentence pronounced by him against the Bishop of Natal, are null and void in law."

Lord Chancellor Chelmsford. 3 Moore's P. C. N. S. 115.

"In order to constitute acquiescence or waiver, it must be shown that the party said or did something to give the Court a jurisdiction it did not possess. Mere respectful acquiescence or submission to the ruling of the Court will not a nount to a waiver of a right to complain of an illegal decision."

Lord Chief Baron Pollock. Beaudry v. The Mayor of Montreal. 11 Moore's P. C. 426.

"There is one broad and salutary principle underlying the power of all courts, which is, that where there is an entire want of jurisdiction over the cause or the parties as distinguished from an irregularity in the manner in which it is exerted, the defect cannot be *waived* and will be sufficient for treating the proceedings as void in a subsequent suit in which their validity is drawn in question."

1 Smith's Ldg. cases. Crepps v. Durden. Sec. 848, and cases cited.

X.

It is *after* jurisdiction has vested *in the court* in the particular case that a party is to make his *Defence*, "for defence in its true legal sense signifies an opposing or denial of the truth or validity of the *complaint*" "which has been referred to the judgment of the court;" "for it is an elemental principle that no man's rights should be adjudged until he has had *his day in Court* and an opportunity to be heard."

3 Black. Comm. Sec. 296.
Peck, J. Trimble v. Longman. 13 Ohio State, 438.
Shaw, C. J. Fisher v. McGirr. 1 Gray, 34.

Before a Trial or Hearing can be had *in Court* the record must show an *issue* between the parties to the cause, for "Trial is the examination of the matter of fact put in issue."

3 Bl. Comm. C. 22, Sec's 330, 341.

"The matter which the Jury (or the Court when Hearing without Jury) has to try, is the issue joined upon the pleadings, which are copied on the *nisi prius* record, and at which alone the judge is permitted to look for the question to be tried."

2 Vol. Sharswood's Bl. Comm. C. 23, sec. 373, note 29.
Wright v. Delafield. 25 N. Y. 268.

"The *proof* of the infringement of all criminal or penal laws, must rest on those who allege they have been infringed; this is the rule of law which applies universally to cases of criminal offences."

Lord Justice Turner. Dionissus v. The Queen. 3 Moore's P. C N. S. 187.

"The word *proof* in legal construction, generally means proof *in Court*."

Gold v. Death. Hobart, 92, b.
Beaudry v. The Mayor of Montreal. 11 Moore's P. C. 426.

"The defendant can be *convicted* only of the *charge in the information*, and *that* must be sufficient to support the conviction."

"The evidence must prove, but cannot supply the defects in the information."

Per Lord Mansfield and Ashhurst, J., in Rex v. Wheatman. Doug. 346.
See also, Williams v. Bishop of Salisbury. 2 Moore's P. C., N. S. 375.

XI.

A *preliminary Inquiry*, *Inquest* or *Investigation*, in order to ascertain facts, is not a *judicial inquiry*, *or hearing*, *or trial;* nor will such preliminary inquiry, or investigation, obviate the necessity of *proceeding regularly in Court*, in order to establish a valid judgment divesting a party of any *freehold office* or other legal right;

"for a party has a right to have the *case* against him decided *secundum allegata et probata*, in a *suit* or *proceeding* regularly constituted."

"Which suit or proceeding is commenced only when the accused is served with a citation to appear at a certain time and place before a competent court to answer definite charges preferred against him."

Ditcher v. Denison. 11 Moore's Privy Council, 324.
Bowerbank v. Bishop of Jamaica. 2 Moore's P. C. 470.
Bonaker v. Evans. 16 Q. B. 162.
Willis v. Sir G. Gipps. 5 Moore's P. C. 379.
Emerson v. The Justices of Newfoundland. 8 Moore's P. C. 157.
Warren Hasting's Trial.
James H. Peck's Trial.
James Prescott's Trial, and cases cited in Appendix. C.J.
Inquiry on Petition of S. H. Randall for the Impeachment of George T. Bigelow, by the Judiciary Committee of the House of Representatives of the State of Massachusetts. See Journal of House, pages 286, 315, 319, and Report No. 324 House Documents, A. D. 1866.
Investigation by the House of Assembly of the State of California upon a Citation to Levi Parsons, Judge, etc., to appear before the Assembly and show cause why he should not be impeached. Reported in 1 Calif. Rep. 539.
Recent Inquiry before Committee of 40th Congress.

XII.

At common law every person who is a party to any judicial proceeding, has a right to be tried by a free, impartial and independent judge, and no man can legally be a judge in his own cause, or act in the double capacity of accuser and judge.

Day v. Savage. Hobart, 87.
Calder v. Bull. 3 Dal. 386.
Richardson v. Welcome. 6 Cush. 331.
Cunningham v. Bucklin. 8 Cowen. 183.
Pearce v. Atwood. 13 Mass. 324.
Dimes v. Grand Junction Rail Co. 3 H. L. 759.
Ranger v. Great Western Railway Co. 5 H. L. 72.
Wildes v. Russell. Com. Bench Law Rep. 1866, p. 722.
2 Haw. P. C., C. 72, Sec. 6.
Anonymous, 1 Salk. 396.
Wright v. Crump. 2 Ld. Raym. 766.
City of London v. Wood. 12 Mod. 669.
Bonham's Case. 8 Co. 118. A.
3 Blac. Comm. Sec. 383.
Rex v. Phillips. 4 Burr. 2090.
Art. 19, Bill of Rights. Const of Mass.
Samuel Chase's Trial, pages 344, 345.

"It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges, as free, impartial, and independent, as the lot of humanity will admit."

Art. 19, Declaration of Rights, in Constitution of Massachusetts.

In but one case is a man permitted to be a judge in what is apparently his own cause, but which in reality is not his own cause, but that of the law; and that is, when, in the exercise of the functions of a Court, a judge is called upon to decide whether the Court has been treated with contempt.

Carus Wilson's Case. 7 Q. B. 1014.
Lining v. Bentham. 2 Bay's Rep. 1.
Walker's Case. 1 Calif. 541.

XIII.

The *Judgment* to be pronounced, in every Case, in a Court of Justice, is the sentence of the Law upon the matter contained in the record; and a judgment of a judge pronounced in the court room, when there is *no case* before the court and manifest on the record, calling for the pronouncement of a judgment, is *coram non judice* and void.

3 Blac. Comm. Secs. 395, 396.
Goddard v. Coffin. Davies' C. Ct. 383.
Buckley's Lessees v. Blackwell's Heirs. 10 Ohio, 512.
Wright v. Delafield. 25 N. Y. 268.
Zugasti v. Lamar. 12 Moore's P. C. 331.
Malcomson v. Clayton. 13 Moore's P. C. 206.
Burdett v. Abbott. 14 East, 106.
Capel v. Child. 2 Crompt. & Jerv. 574.
Regina v. Dayman. 7 Ellis & Black. 672.
Gorham v. Luckett. 6 B. Mun. 146.
State v. Bennett. 4 Dev. & Bat. 43, 50.
Smith v. Moore. 3 How. Miss. 42.
Regina v. Bailiffs of Ipswich. 2 Salk. 434.
Bowerbank v. Bishop of Jamaica. 2 Moore's P. C. 361.

Bonaker v. Evans. 16 Q. B. 162.
Shriver's Lessees v. Lynn. 2 How. U. S. 59.
Co. Litt. Book. 1 C. 2.
Regina v. Baines. 2 Lord Ray. 1273.
Bishop's Crim. Procedure, Vol. 1, Sec. 869.
Wheeler v. Webster. 1 E. D. Smith 1.

"It is a rule, as applicable to criminal, as to civil proceedings, that judgment should be given, not only *according to allegations* made against the accused, but *according to the proof* made upon the trial."

Wood, J. Buckley's Lessees v. Blackwell's heirs. 10 Ohio, 512.

"The Judgment of every court must be based upon the pleadings, and the rule that judgment should be rendered in conformity with the allegations and proofs of the parties, *secundum allegata et probata* is fundamental in the administration of justice; and this rule cannot be departed from without inextricable confusion, uncertainty and mischief, in the administration of justice."

Per Smith, J. Wright v. Delafield. 25 N. Y. 268.
Per Lord Justice Bruce. Zugasti v. Lamar. 12 Moore's P. C. 331.
Per Lord Chancellor Chelmsford. Malcomson v. Clayton. 13 Moore's P. C. 206. Jackson v. State. 21 Texas 668.

"A judgment in its nature, concludes the subject on which it is rendered, and pronounces the law of the CASE."

Marshall, C. J. Ex Parte Watkins. 3 Pet. 202.

"It is a sound rule, that the record ought to show enough to support the judgment of the Court, and that the judgment is barely the legal inference from the history of the facts stated in the *preceding* record."

Field, J., delivering opinion of the Court, in Hann v. Field. Littell's Sel. Cases, 376.

"In the case of Serjeant Whitacre, his notice was to answer his non-attendance at a sessions of *oyer* and *terminer* and therewith he was charged; whereas, he is turned out for non-attendance at a sessions of peace, and indeed answered to that though not charged therewith; which the Court held incurable and fatal, and ordered a peremptory mandamus."

Regina v. Bailiffs of Ipswich. 2 Salk. 434.

"If there be any one thing done in the progress of a cause from its commencement to its conclusion, that is particularly and emphatically a *judicial act*, it is the rendition of judgment. The Judgment is the determination of the law, but the law can speak only through its regular organs, and therefore, the conclusion of law must be pronounced by the Court. The record must show that it is the Judgment of the Court, and the record must speak the truth."

Daveis, J. Goddard v. Coffin. Daveis, C. Ct. Rep. 383.

"Judgments are the sentence of the Law pronounced by the Court upon the matter contained in the record. The judgment, though pronounced or awarded by the judges, is not their determination and sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law and fact, which judgment or conclusion depends not, therefore, on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries, and the suit or action is the vehicle or means of administering it; therefore, the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own; but it is considered, *consideratum est per curiam*, that the plaintiff do recover his damages, his debt, his possession, and the like, which implies that the judgment is none of their own, but the act of law pronounced and declared by the court after due deliberation and inquiry."

3 Blac. Comm. Secs. 395, 396.
See also, 1 Co. Inst. 39. A.

"A Judgment, though pronounced by the judge, is not *his sentence*, but the sentence of the law. It is the certain and final conclusion of the law following upon ascertained premises."

Gaston, J. The State v. Bennett. 4 Dev. & Bat. 43.

"It is a settled maxim that a judge has a *private* and a *judicial* knowledge, but he cannot give a judgment upon his private knowledge, for he is obliged to give it *according to law* and what is proved. If he has a private knowledge of a fact, he may be sworn as a witness, and then the parties have an opportunity to examine

and cross-examine him and to introduce explanatory or contradictory proof. But how is this invaluable right to be preserved if the judge keeps the facts locked up in his own breast until he decides?"

Trotter, J. Smith v. Moore. 3 How. Miss. 42.
Wheeler v. Webster, 1 E.D. Smith 1.

"No legal judgment can be founded on knowledge in the breast of a judge, for a party upon an appeal would not know what he was to meet, or be prepared adequately to make his defence."

Per Lord Lyndhurst, C. B. Capel v. Child. 2 Crompt. & Jerv., 577.

"Having no jurisdiction we should give no opinion. We are not a court of advice but of *oyer* and *terminer*. We sit here not to deliver opinions, which, out of respect to us, might be generally followed, yet which might without impropriety be neglected, but to deliver judgments which may be enforced. We ought not to give an opinion except as a judgment."

"Our opinion might very properly be treated as extra-judicial and not binding."

Lord Campbell and Wightman, J., in Regina v. Dayman. 7 Ellis & B. 672, 676.

"The ground on which the judgment of the House of Lords, in the Banbury case, was held not to conclude the question, 'was because the proper course had not been pursued to bring the question of peerage in judgment before the Lords, and therefore it was *coram non judice*, for the resolutions of the Lords in that case were taken upon a petition from the defendant to the House itself,' whereas the proper course for the trial of the right of peerage is by petition from the claimant to the King, who thereupon refers it to the Lords."

"Here was no judgment. A court can give no judgment in a thing not depending, or that does not come in a judicial way before the Court."

2 Salk. 511, Skinner's R. 522.
Burdett v. Abbott. 14 East. 106.

A judgment rendered without legal premises is void, no judgment at all.

Regina v. Baines. 2 Ld. Raym. 1273.

"By Statute 25 Ed. 1, Cap. 2, judgments given against any points of the charter of *Magna Charta* are adjudged void."

XIV.

At Common Law the judicial proceedings (as well civil as criminal) of all Courts of Record, from the first act in instituting each particular proceeding, to the last act in which a court can lawfully exercise its jurisdiction or authority, are kept in books or rolls of paper or parchment, as evidence of what has actually transpired in each particular proceeding.

These Records are ordinarily of two kinds. First, the temporary record of the Court and usually denominated the Clerk's docket, and serving as the Record of the Court until the cause is finally disposed of. And second, the Record of Judgments, or the Book in which, what is called the extended record of the cause, made up from the process and proceedings on the files, with the aid of the docket entries, more or less fully by the clerks of the various Courts, in each jurisdiction, is left finally to stand as the permanent memorial of the cause and the foundation of the Judgment of the Law. These records are regarded as absolutely indispensable in all cases. And in criminal proceedings no less than in civil, a necessity exists for the utmost accuracy in their original keeping and final enrollment. And every court of record is usually provided by law with a Clerk, whose business and duty it is, to docket every proceeding or cause so soon as it is filed or entered in Court; that is, placed in the hands of the Clerk, as the agent of the court; and thereafter, as each act or order is made or directed to be done by the Court, to make an entry of the same, in the first instance, on the docket in the proceeding to which the act or order has reference, and when the case is finally disposed of, to prepare an enduring memorial of the proceeding on the Record Book of Judgments.

Sayles v. Briggs. 4 Met. 423.
Davidson v. Murphy. 13 Conn. 217.
Read v. Sutton. 2 Cush. 115.
Lehr v. Hall. 5 How. Miss. 58.
Officers of Court v. Fisk. 7 How. Miss. 403.
Burney v. Boyell. 1 How. Miss. 39.
Dickson v. Hoff. 3 How. Miss. 165.
Coolidge v. Inglee. 13 Mass. 41.
Inglee v. Coolidge. 2 Wheat. 363.

Lessor of Fisher v. Cockerell. 5 Pet. 248.
Shelton v. Tiffin. 6 How. U. S. 188.
Sargeant v. Bank of Indiana. 12 How. U. S. 371.
Suydam v. Williamson. 20 How. U. S. 428.
Gaines v. Hennen. 24 How. U. S. 553.
Gibson v. Comw. 2 Va. Cases, 111.
Rex v. Horne. Cowp. 672.
1 Stark. Cr. Pl. 2nd Ed. 68.
3 Blac Comm. Sec. 24.
1 Bishop's Cr. Proc. Secs. 905, 906, 922.
Appendix to 4 Moore's Privy Council, Rep.
Knapp v. Abell. 10 Allen, 488.
Wright v. Nichols. 1 Bibb, 300.
Tuggle v. Adams. 3 Marshall, 431.
Mims v. Mims. 3 J. J. Marshall, 105.
Comw. v. Chambers. 1 Dana, 12.
Fergurson v. Harwood. 7 Cra. 408.
Thomas v. Tanner. 14 How. N.Y. Prac. 426.

"A Court of Record is that wherein the acts and judicial proceedings are enrolled on parchment for a perpetual memorial and testimony; which rolls are called the records of the court and are of such high and super-eminent authority that their truth is not to be called in question; for it is a settled rule and maxim that nothing shall be averred against a record; and if the existence of a record be denied, it shall be tried by nothing but itself, that is upon bare inspection, whether there be any such record or no, else there would be no end of disputes."

3 Blac. Comm. Sec. 24.

"A record is a memorial or history of the judicial proceedings in a case, commencing with the writ or complaint and terminating with the judgment; and the design is not merely to settle the particular question in difference between the parties, or the government and the subject, but to furnish fixed and determinate rules and precedents, for all future like cases. A record, therefore, must be precise and clear, containing proof within itself of every important fact on which the judgment rests, and it cannot exist partly in writing and partly in parol. Its allegations and facts are not the subject of contradiction; they are received as the truth itself, and no averment can be made against them nor can they be varied by parol."

Hubbard, J. Sayles v. Briggs. 4 Met. 423.

"A record in judicial proceedings, is a precise history of the suit from its commencement to its termination, including the conclusions of law thereon, drawn up by the proper officer, for the purpose of perpetuating the exact state of facts, or in the language of Lord Coke, 'records are memorials or remembrances, in rolls of parchment, of the proceedings and acts of a Court of Justice which hath power to hold plea according to the course of the common law' and are of such incontrollable credit and verity as that they admit no averment, plea or proof to the contrary, and if such record be alleged and it be pleaded that there is no such record it shall be tried only by itself. Co. Litt. 260. A."

Williams, C. J. Davidson v. Murphy. 13 Conn. 217.

"A record of a Court is a memorial of a Court of Justice and of such unquestionable verity that it may not be contradicted. The Judgment and all the proceedings previous to it are carefully registered and preserved in public repositories under the name of a record, in a form well known, which comprises a complete history of the cause with the conclusion of law upon it. Now, the memorandum offered was no record in form, substance or intention. It was an imperfect hint *made by the Justice for his own use* to be added to and extended by his recollection. Were a Justice of the peace a commissioner only, there must be some certainty in his proceedings, something that would be complete without guessing or *sub intelligitur;* but the court of a Justice of the peace is a court of record, and in its records not distinguishable from any other court of *record*. If it come to this that any imperfect *memorandum* is a record, records ought no longer to be considered as instruments of incontrovertible verity, but as the most slight and inartificial of all judicial writings. In fine, this is a case in which reasoning is out of place; because the appeal is not to reasoning, but to common sense. *Qui nomina intelligit, res etiam intelligit.* He who knows what a *record* is, knows that a loose memorandum is not a record, and by the same operation of mind that he knows an ox is not a horse."

Hosmer, C. J. In case in note to Davidson v. Murphy. 13 Conn. 217.

"The record of Judicial proceedings is always, in the first instance, taken down by the clerk of the Court, in the way of short

entries made upon his docket, or of endorsements upon papers filed, and the like. It is not until after the term of the Court closes, that the extended record, or record proper, is made; and for the making up of this record, resort is had to the docket entries, to the accompanying files of papers, and to the several endorsements upon them. These serve as *memoranda* for the Clerk. In England, the extended entry, or record proper, is written upon parchment; in the United States, books made of stout paper are used."

"The Clerk of the Court, in making these docket entries and the like, though practically proceeding, in most instances, without any interference or special instructions from the bench, still, in point of law, acts as the recording agent of the Judge who is entitled to supervise and control his entries and who does sometimes practically interfere with them."

"It requires but a little exercise of our natural reason to teach us, that in the nature of things there must be docket entries and other like memoranda of steps taken in the cause, which, while serving a necessary temporary purpose, like the scaffolding of a building in the process of being erected, should be left as unrecorded rubbish when the perfected structure of the finished cause is to appear standing for the inspection of future ages, upon the record."

1 Vol. Bishop's Crim. Procedure. Tit. Record. Secs. 905, 906, 922.

"The docket is the record until the record is fully extended, and the same rules of presumed verity apply to it as to the record. Every entry is the statement of the act of the Court, and must be presumed to be made by its direction, either by a particular order for that entry, or by a general order, or by a general and recognized usage and practice, which presupposes such an order."

Shaw, C. J. Read v. Sutton. 2 Cush. 115, 123.

"The report of a judge is not a part of the Record, nor are the reasons given for the final opinion of the Court, nor the papers and documents filed in the case."

In opinion of Court. Coolidge v. Inglee. 13 Mass. 41.
Per Story, J. Inglee v. Coolidge. 2 Wheat. 263.
Thomas v. Tanner. 14 How. N. Y. Prac. 426.

"The mere fact of a paper being found among the files of
Sullivan. 10 Wheat. 199.

"A record in judicial proceedings, is a precise history of the suit from its commencement to its termination, including the conclusions of law thereon, drawn up by the proper officer, for the purpose of perpetuating the exact state of facts, or in the language of Lord Coke, 'records are memorials or remembrances, in rolls of parchment, of the proceedings and acts of a Court of Justice which hath power to hold plea according to the course of the common law' and are of such incontrollable credit and verity as that they admit no averment, plea or proof to the contrary, and if such record be alleged and it be pleaded that there is no such record it shall be tried only by itself. Co. Litt. 260. A."

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Hosmer, C. J. In case in note to Davidson v. Murphy. 13 Conn. 217.

"The record of Judicial proceedings is always, in the first instance, taken down by the clerk of the Court, in the way of short

entries made upon his docket, or of endorsements upon papers filed, and the like. It is not until after the term of the Court closes, that the extended record, or record proper, is made; and for the making up of this record, resort is had to the docket entries, to the accompanying files of papers, and to the several endorsements upon them. These serve as *memoranda* for the Clerk. In England, the extended entry, or record proper, is written upon parchment; in the United States, books made of stout paper are used."

"The Clerk of the Court, in making these docket entries and the like, though practically proceeding, in most instances, without any interference or special instructions from the bench, still, in point of law, acts as the recording agent of the Judge who is entitled to supervise and control his entries and who does sometimes practically interfere with them."

"It requires but a little exercise of our natural reason to teach us, that in the nature of things there must be docket entries and other like memoranda of steps taken in the cause, which, while serving a necessary temporary purpose, like the scaffolding of a building in the process of being erected, should be left as unrecorded rubbish when the perfected structure of the finished cause is to appear standing for the inspection of future ages, upon the record."

1 Vol. Bishop's Crim. Procedure. Tit. Record. Secs. 905, 906, 922.

"The docket is the record until the record is fully extended, and the same rules of presumed verity apply to it as to the record. Every entry is the statement of the act of the Court, and must be presumed to be made by its direction, either by a particular order for that entry, or by a general order, or by a general and recognized usage and practice, which presupposes such an order."

Shaw, C. J. Read v. Sutton. 2 Cush. 115, 123.

"The report of a judge is not a part of the Record, nor are the reasons given for the final opinion of the Court, nor the papers and documents filed in the case."

In opinion of Court. Coolidge v. Inglee. 13 Mass. 41.
Per Story, J. Inglee v. Coolidge. 2 Wheat. 263.
Thomas v. Tanner. 14 How. N. Y. Prac. 426.

"The mere fact of a paper being found among the files of a cause does not of itself constitute it a part of the record of the

cause. In order to render it a part of the record, it should form some part of the pleadings in the cause or be brought under and ingrafted upon the action of the Court by some motion from the parties. Without this, such a paper can no more be a portion of the record than would the knowledge of facts on the part of a witness who had been summoned and not examined, or the oral testimony given to a jury and not noted by exception or otherwise."

Daniel, J. Sargeant v. Bank of Indiana. 12 How. U. S. 384.

"We take it to be a well established rule of law, that where a party relies on the judgment of a Court of record as evidence to support an action, the 'record of the Judgment' should be exhibited."

"What constitutes such a record is well known to the profession, and what would be an authentication of such a record is equally well known. It will not be safe to take for a record of a recovery parts and scraps thereof from the minute book. The original writ, declaration, pleadings, judgment &c., are required in making up a full and complete record, and then a certificate under seal that it is a full and complete record of judgment and proceedings had therein, or the entire record itself, as the judgment stands recorded in the book of records of final judgments should be produced."

Turner, J., delivering opinion of the Court in Lehr v. Hall. 5 How, Miss. 58.

"As to the question, what portion of the papers in a cause in this Court are to be recorded by the Clerk in making up the record, we consider that the process which brings the cause into this Court, the transcript of the Record, the assignment of errors and joinder in error, all the orders and the final judgment of this Court, should be recorded."

Opinion of the Court in Officers of Court v. Fisk. 7 How. Miss. 403.

"The record of a case need not state all the proceedings in detail. It is enough that it shows the subject matter of the suit, jurisdiction over the parties and the final judgment of the Court."

Gray, J. Knapp v. Abell. 10 Allen, 488.

As to form of making up certain Records in U.S. Courts
See Stats 3 March 1803. Sec. 2. & 26 Feb. 1853. Sec. 1
cited in Wrightson's Digest page 131. Note B.

XV.

This permanent record is a protection not only to the parties to the proceeding whose legal rights are affected and established by it, but it is deemed *vital* by the Law itself in order to bear testimony to its righteousness in judgment, by a uniform and regular administration of justice, in all cases, through its duly authorized agents, of which the record is its mirror to all the world; and when regular, to serve as a justification and protection to the Law's agents, who, so far as disclosed by the record, have undertaken to deal with and dispose of the legal rights of the subject or citizen in the name and by the authority of Law.

And it is held sufficient, with regard to the record of a judgment of a Court of Record, whether of general or limited jurisdiction, that it show a subject matter referred to the judgment of the Court and notice to the party against whom the judgment operates or his appearance *in court*, prior to the entry of the judgment of the Law. These two principal elements of every judicial proceeding appearing on the face of the record to exist, however silent in all other respects the record may be, it will be presumed to be regular in every other jurisdiction and sufficient *prima facie* to sustain the judgment and protect the judge, who, as a Court, directed a judgment or order to be entered on the record. If, however, it appears on the face of any proceeding claimed to be judicial, there was no *particular subject matter* referred to the judgment of the Court in some appropriate and legal form of original process or proceeding, and no *notice to* or *appearance by* the party *in Court*, or that either of these two elements of jurisdiction are wanting, the judgment or order purporting to have been pronounced by the Court will be without legal premises to sustain it, and in every other jurisdiction wherein its force, effect, and validity, as a judgment of Law, is collaterally denied or relied upon, it will be regarded in law as *coram non judice* and as a nullity, and as furnishing no protection or justification to the judge by whose action or authority the judgment or order so called was directed to be entered.

Kemp's Lessee v. Kennedy. 5 Cra. 173.
McCormic v. Sullivant. 10 Wheat. 199.

Elliot v. Piersol. 1 Pet. 340.
Voorhees v. Bank of United States. 10 Pet. 449.
Thompson v. Tolmie. 2 Pet. 162.
Hollingsworth v. Barbour. 4 Pet. 475.
Lessees of Walden v. Craig's Heirs. 14 Pet. 154.
Williamson v. Berry. 8 How. 495.
Webster v. Reid. 11 How. 437.
Grignons' Lessees v. Astor. 2 How. 319.
Shrivers' Lessees v. Lynn. 2 How. 33.
Boswell's Lessee v. Otis. 9 How. 336.
Huff v. Hutchinson. 14 How. 586.
Adams v. Preston. 22 How. 488.
Parker v. Kane. 22 How. 1.
Gray v. Brignardello. 1 Wall. 634.
Harvey v. Tyler. 2 Wall. 342.
Comstock v. Crawford. 3 Wall. 397.
Sheldon v. Newton. 3 Ohio St. 498.
Seeley v. Reid. 3 Greene's Iowa, 374.
Reed v. Wright. 2 Iowa, 15.
Hall v. Williams. 6 Pick. 232.
Bloom v. Burdick. 1 Hill. N. Y. 140.
Moore v. Starks. 1 Ohio, N. S. 369.
Hess v. Cole. 3 New Jersey, 116.
Fergurson v. Mahon. 11 A. & E. 179.
The Queen v. Bolton. 1 Q. B. 71.
Houlden v. Smith. 14 Q. B. 841.
Howard v. Gossett. 10 Q. B. 359, 411.
1 Smith's Ldg. Cases. 1866 Ed. Sec. 834, and cases cited.

"Where a Court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decisions be correct or otherwise its judgment until reversed is regarded as binding in every other Court. *But if it acts without authority its judgments and orders are regarded as nullities.* They are not voidable but simply void and form no bar to a recovery sought even *prior to a reversal* in opposition to them. They constitute no justification and all persons concerned in executing such judgments or sentences are considered in law as trespassers."

"The distinction runs through all the cases on the subject, and it proves that the jurisdiction of any court exercising authority over a subject may be inquired into, in every court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

Trimble, J., delivering opinion of the Court, in Elliot v. Piersol. 1 Pet. 340.

"The line which separates error in judgment from the usurpation of power is very definite; and is precisely that which denotes

the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity, collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity, in the other, mere waste paper; there can be no middle character assigned to judicial proceedings, which are irreversible for error."

Baldwin, J., delivering opinion of the Court, in Voorhees v. Bank of the U. S. 10 Pet. 475.

"It is a universal principle, that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion; the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for any thing done in the exercise of that discretion *within the authority and power conferred*."

"The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law."

Baldwin, J., delivering opinion of the Court, in United States v. Arredondo. 6 Pet. 709.

"A settled axiom of the law furnishes the governing principles by which these proceedings are to be tested. If the Court had jurisdiction of the subject matter, and the parties, it is altogether immaterial how grossly irregular, or manifestly erroneous, its proceedings may have been; its final order cannot be regarded as a nullity, and cannot, therefore, be collaterally impeached."

"On the other hand, if it proceeded without jurisdiction, it is equally unimportant how technically correct, and precisely certain, in point of form, its record may appear; its judgment is void to every intent, and for every purpose, and must be so declared by every Court in which it is presented. In the one case, the Court is invested with the power to determine the rights, and no irregularity,

or error in the execution of the power, can prevent its judgment, while it stands unreversed, from disposing of such rights as fall within the scope of its adjudication; while in the other, its authority is wholly usurped, and its judgments and orders, the exercise of arbitrary power under the forms, but without the sanction of law."

Ranney, J., delivering opinion of the Court, in Sheldon v. Newton. 3 Ohio State, Rep. 498.

"The general and well settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears upon the face of them that the subject matter was within the jurisdiction of the court, they are voidable only."

"The errors and irregularities, if any exist, are to be corrected by some direct proceeding either before the same Court to set them aside, or in an Appellate Court."

"If there is a total want of jurisdiction, the proceedings are void, and a mere nullity, and confer no right, and afford no justification, and may be rejected when collaterally drawn in question."

Thompson, J. Thompson. v. Tolmie. 2 Pet. 162.

"Where it appears on the face of the proceedings that the magistrate had no jurisdiction, the proceedings are wholly void, the commitment is without authority and the party committed is entitled to be discharged on *habeas corpus* from his imprisonment, *without reversal of the judgment*."

Shaw, C. J. Herrick v. Smith. 1 Gray, 50.

"The Justice having jurisdiction of the *subject matter of the suit*, and of the person of the defendant his judgment cannot be attacked collaterally."

Wesson v. Chamberlain. 3 Comstock, 331.

"Jurisdiction will be presumed unless on the *face of* the proceeding it is legally impossible to presume it."

Bidwell v. Astor Mutual Ins. Co. 16 N. Y. 263.

"If the record does not show any service of process or any appearance in the *suit*, a party may be allowed to avoid the effect of a judgment, by showing that he was not within the jurisdiction of the court which rendered it, for it is manifestly against first principles,

that a man should be condemned either criminally or civilly without an opportunity to be heard in his defence."

Parker, C. J. Hall v. Williams. 6 Pick. 239.

"The decree offered in this case as conclusive evidence of a violation of blockade by the vessel insured cannot be held so to operate. For it does not appear that any libel was filed, any monition issued, any hearing had, or that any of those formalities had taken place which are necessary to give a conclusive operation to decrees of foreign courts. For aught that appears from the copy of the proceedings before us, the forfeiture was decreed by mere arbitrary power, without any trial, and that some of the forms of justice used in civilized countries, had been assumed without any regard to the substantial requisites of a *judicial inquiry*."

Parker, C. J. Sawyer v. Maine Ins. Co. 12 Mass. 291.

"The test of jurisdiction is, whether or not the Justices had power to enter upon the inquiry, not whether their conclusions in the course of it were true or false; and we receive evidence, not to show the magistrate has come to a wrong conclusion, but that he never ought to have begun the inquiry."

Lord Denman, C. J. The Queen v. Bolton. 1 Q. B. 71.

"A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self constituted body or by a body not empowered by its government to take cognizance of the subject it had decided, could have *no legal effect whatever*. The power of the Court then is, of necessity, examinable to a certain extent, by that tribunal, which is compelled to decide whether its sentence has changed the *right of property*. The power under which it acts must be looked into, and its authority to decide questions which it professes to decide must be considered. Upon principle it would seem that the operation of *every judgment* must depend on the *power* of the Court to render that judgment, or in other words, on its jurisdiction over the subject matter which it has determined."

Marshall, C. J. Rose v. Himely. 3 How. U. S. 762.

"If Jurisdiction be taken where there has been no service of process or notice the proceeding is a nullity. It is not only voidable but it is absolutely void."

Lessee of Walden v. Craig's Heirs. 14 Pet. 154.

"When a judgment is brought collaterally before the Court as evidence, it may be shown to be void upon its *face* by a want of notice to the person against whom judgment was entered, or for fraud."

McLean, J. Webster v. Reid. 11 How. 460.

"A judgment which is absolutely void may be impeached by any person to whom it is prejudicial by *plea* and *proof*."

Downs v. Fuller. 2 Met. 135.

"In reference to courts of general jurisdiction, the general rule is, that every presumption *not inconsistent with the record* is to be indulged in favor of their jurisdiction, and their judgments however erroneous, cannot be questioned when introduced collaterally, unless it be shown affirmatively that they had no jurisdiction of the case."

Miller, J. Harvey v. Tyler. 2 Wall. 342.

"The presumption in favor of the jurisdiction of superior courts necessarily ceases when the proceedings themselves negative the existence of jurisdiction. This is well settled as it regards their jurisdiction over the cause, and would seem to be equally true of their authority over the parties. When, therefore, the record shows expressly or by necessary implication that the court has proceeded without notice to the parties, the judgment will be void, and may be disregarded as such in any collateral proceeding in which it is called in question."

Crepps v. Durden. 1 Smith's Ldg. Cases, P. 1023, Ed. of 1866.

"The distinction between the acts of inferior courts, and those of superior tribunals is this only: That the acts of inferior courts are not good unless *prima facie* within their jurisdiction. The acts of superior courts are void when manifestly beyond their jurisdiction."

1 Smith's Leading Cases (H. and W. Notes), Pages 824-5.

XVI.

The Common Law makes no distinction in dealing with the rights of Attorneys at Law, different from its mode of disposition of the rights of other classes of persons, who are in the possession of Freehold Offices or other Vested Rights. On the contrary, the principle universally obtains, wherever the rules of the common law prevail, that the Office, Privilege or License of an Attorney having once been legally conferred upon or acquired by a party by *record*, remains in his possession, with all its rights and privileges, until he is legally divested of it by *record*, or by his death or resignation.

And to remove an Attorney from his office or to strike an Attorney's name from the Roll, has been uniformly regarded as a proceeding *criminal in its nature*, but whether criminal or civil, as a strictly *judicial proceeding* to be effected only by "due process of law," and by the exercise of the *Discretionary* ~~and not the Arbitrary~~ power of a Court, and not the arbitrary power of a Judge.

And "due process of law" in the case of Attorneys at Law is held to require, whatever may be the form of process or mode of procedure, and for whatever cause, (invariably limited to causes involving moral or professional delinquency,) that there shall be a sufficient charge or allegation in writing, duly filed of record in Court, specifying the particular offence or matter complained of, (usually supported by the oath of the party preferring the accusation) and unless waived of record, written notice served on the Attorney to show cause why he should not be removed from his office or his name stricken from the Roll of Attorneys for the offence or matter complained of; and which notice should specify the time when the place where, and the tribunal before which he is to appear and answer. The Attorney is entitled to a *day in Court* on which to make defence, and the trial is to be conducted like all other trials in summary proceedings at the Common Law, and the Attorney convicted only if the proofs shall establish or confirm the allegations. The Judgment to be pronounced must be the Judgment of the law upon the matter contained in the record, and the process and proceedings enrolled on the *Record Book* of judgments of the

Court, as a permanent memorial of the cause and of the Judgment of the Law.

State of Iowa v. Start. 7 Iowa, 499.
Ex Parte Burr. 9 Wheat. 529.
State of Ohio v. Chapman. 11 Ohio, 430.
The People v. Turner. 1 Calif. 150.
The People v. Lamborn. 1 Scam. Ill. 123.
Mill's Case. 1 Michigan, 193.
Bryant's Case. 4 Fost. (N. H.) 450.
Smith v. Tennessee. 1 Yerger. 228.
Perry v. The State. 3 Greene, Iowa, 550.
Rice v. Commonwealth. 18 B. Mun. 472.
Bibb v. Smith. 1 Dana, 582.
In re the Justices of Antigua. 1 Knapp's Privy Council, 267.
Aitkin's case. 4 Barn. and Ald. 47.
In re Lowe. 8 East, 237.
In re Lord. 2 Scott, 131.
In re Fenton. 5 N. & M. 239.
In re Marris. 2 A. & E. 582.
Ex Parte Hague. 3 Brod. & Bing. 257.
Hughes v. Mayre. 3 T. R. 275.
Goodwin v. Gosnell. 2 Collyer, 457.
In re Martin. 6 Beav. 337.
In re Monks. 4 Dea. and Chitty, 28. 482.
Ex Parte Bull. 3 Dea. and Chitty, 119, 563.
In re "Gent." 1 Excheq. 453.
Ex Parte Sharpe. 1 Jur. 405.
Waddsworth v. Allen. 1 Chitty's Rep. 186.
Tyler v. Webb. 7 E. L. and E. 281.
Pitt v. Yadden. 4 Burr. 2060.
Beal v. Langstaff. 2 Wils. 371.
Evans v. P———. 2 Wils. 382.
Rex v. Tew. Sayer, 50.
Russell's case. Sayer, 125.
Rex. v. Bennett. Sayer, 169.
Rex v. Addington. Sayer, 259.
Mordecai v. Solomon. Sayer, 172.
Tidd's Prac. Sec. 60.
2 Chitty's Pract. Sec. 338, 387, 394.
Impey's Practice. Page 69.
1 Sellon's Pract. Page 28.
1 Archb. Pract. Page 67, 115, 117, 8th Lond. Ed.
Howe's Mass. Practice. Page 43.
2 Greenleaf on Evid. Sec. 147.
2 Hawk P. C. C. 22. Sec. 206.
1 Bouv. Bac. Abr. P. 474. 505.
8 Bouv. Bac. Abr. P. 164.

1 Wis. R.S. 109. Secs 23 to 25.
Jackson v. State 21 Texas. 668
Cited in 19 US. Digest. Page 68. Ab. 1865.

"In order to revoke or suspend the license of an attorney, the law requires that there should be an accusation and charges, a notice and a day in court, and it cannot be done summarily by the order of the Court."

By the Court, Woodward J. State of Iowa v. Start. 7 Iowa, 499.

"That the charges in a regular complaint against an attorney, ought not to be received and acted on, unless made on oath, is admitted. It is a course of proceeding which is recommended by considerations too obvious to require that they should be urged."

Marshall, C. J. Ex Parte Burr., 9 Wheat. 529.

"It is true that being Officers of the Court, Attorneys are in many respects subject to the orders of the Court, but these orders must be the result of sound and legal and not of arbitrary and uncontrolled discretion."

"Where an attorney is proceeded against with the object of striking his name from the Roll, he is entitled to have notice of the charges against him, and an opportunity to make his defence. This is not only the dictate of natural justice, and the uniform practice in such cases, but it has been carried into an express adjudication in *ex parte* Heyfron: 7 How. Miss. 127. In the case at Bar, no notice of the charges upon which the order was made was given, no opportunity for explanation, apology or defence was afforded, the judgment of the Court was *ex parte*, and condemned the defendants without a hearing. A judgment thus rendered partaking so strongly of the nature of a criminal proceeding, and so serious in its consequences, cannot be supported."

By the Court, Bennett, J. The People v. Turner. 1 Calif. 150.

"The statute which is supposed to authorize this inquiry is the 4th Section of the act entitled 'An Act to Regulate the Admission and Practice of Attorneys and Counsellors at Law,' Swan's Stat. 96, in these words: 'The Supreme Court, or Court of Common Pleas, shall have power to suspend any Attorney and Counsellor at Law from practising in their respective Courts, for misconduct in office or for good cause shown.' The Statute, it will be observed, is broad in its terms, and casts upon us the protection of the

moral and official integrity of the profession. This Court should not hesitate for a moment to exercise the discretion with which it is clothed by the Law, to purify the Bar of official delinquency and base immorality. This is due to its own dignity and to preserve the character and integrity of the whole profession from scandal and reproach."

"The discretion, however, with which we are invested, is by no means arbitrary, but is to be applied according to legal rules. The allegations and the proofs are to be considered in the usual way, and they must correspond, substantially at least, or the accused must go acquitted."

Per Wood, J., delivering opinion of the Court, in The State v. Chapman. 11 Ohio, 530.

"The finding or judgment against an Attorney should specify the particular charge or charges upon which the Attorney's guilt was pronounced."

By the Court, Greene, J. Perry v. The State. 3 Greene, Iowa, 551.

"Whilst advocates in the Colonies have an appeal to his Majesty the power to remove them from practice can never be abused."

Lord Wynwood. In re the Justices of Antigua. 1 Knapp's Privy Council, 267.

The fact that an attorney may be liable to other punishment in a strictly criminal proceeding, or has been already convicted and punished as a *citizen* or *subject*, for the same act for which he may be also punished as an *officer* by the forfeiture of his office, does not dispense with the necessity of proceeding against him by "due process of law," in order to establish a valid judgment or order of removal from Office, or of striking his name from the Roll. For whatever may be the object of the proceeding, each legal right as it is divested, must be divested legally, and every judgment of law rest on its own foundation.

State v. Holding. 1 McCord, 379.
Smith's Case. 1 Yerger, 228.
Ex Parte Brown. 1 How. Miss. 303.
Anonymous. 2 Halst, 162.
State v. Fields. 1 Mar. & Yerg. 170

In re Smith. 1 Brod. & Bing. 522.
Ex Parte Brownshall. 2 Cowper, 829.
Stevens v. Hill. 10 M. and Wellsby, 28.
In re King. 8 Q. B. 129.
King v. Southerton. 6 East, 127.
In re Wright. 1 Excheq. 658.

In two States, Alabama and Virginia, the rules of the common law authorizing the removal of Attorneys by the Discretionary power of the Court no longer prevail, and by statute such removals can be effected only after a jury trial has been had.

In re Dorsay. 7 Porter Ala. 381.
Ex Parte Fisher. 6 Leigh, 619.

In the following cases the "judgments" or "orders" removing the Attorneys from their offices or striking their names from the Rolls, having been made without "due process of law," and by the exercise solely of arbitrary power, were declared to be *illegal and void*, (and were also reversed,) by Courts having a Superintending or Appellate jurisdiction.

Ex Parte Heyfron. 7 How. Miss. 127.
State of Iowa v. Start. 7 Iowa, 499.
Fletcher v. Daingerfield. 20 Calif. 430.
People v. Turner. 1 Calif. 143.
People v. Turner. 1 Calif. 190.
In re Monckton. 1 Moore's Privy Council, 455.
Smith v. Justices of Sierra Leone. 3 Moore's P. C. 361.
In re Downie. 3 Moore's P. C. 414.
In re Arundell. 3 Moore's P. C. 414.
Smith v. Justices of Sierra Leone. 7 Moore's P. C. 174.
Emerson v. The Justices of the Supreme Court of New Foundland. 8 Moore's P. C. 157.

In re Wallace. 4 Moore's P.C. (N.S.) 140
Wilkins v. State. 36 Ala. 252.

In Massachusetts the admission and removal of Attorneys is regulated wholly by Statute. An admission in either the Supreme Judicial or Superior Court operates as an admission of an Attorney to practice in any of the Courts of the Commonwealth; and a removal by either Court as an exclusion from all. See Gen. Stats. C. 121. Secs. 28–34. The following is the Statute provision on the subject of removals.

"An Attorney may be removed by the Supreme Judicial Court or Superior Court, for any *deceit*, *malpractice*, or other *gross misconduct*, and shall also be liable in damages to the party injured

thereby, and to such other punishment as may be provided by law; and the expenses and cost of the inquiry and proceedings in any Court for the removal of an Attorney, shall be paid as in criminal prosecutions in the same Courts."

General Statutes, chap. 121. Sec. 34.

Under the provisions of this Statute the following Precedents of Practice or Modes of Procedure have occurred.

Commonwealth v. Staples.

By process of Information, filed in the Supreme Judicial Court for Suffolk County, at the April Term, 1863. Case No. 294.

Commonwealth v. Floyd.

By Process of Complaint, filed in the Superior Court for the County of Suffolk, for Criminal Business, at February Term, 1864. Case No. 422.

Dwyer v. Bradley.

By process of Petition, filed in the Superior Court for Suffolk County, at September Term, 1856. Case No. 4439.

Gallagher v. Toomey.

By Process of Complaint, filed in the Superior Court for Suffolk County, at July Term, 1860. Case No. 3867.

Harper v. Maine.

By Process of Petition, filed in the Superior Court for Suffolk County, at September Term, 1858. Case No. 5025.

Harper v. Ross.

By Process of Petition, filed in the Superior Court for Suffolk County, at October Term, 1867. Case No. 3675.

Briggs v. McGuire.

By Process of Petition, filed in the Superior Court for Suffolk County, at January Term, 1868. Case No. 2584.

There have been two other removals by the Superior Court, for the County of Suffolk for Criminal business. Both on Motion, after Indictment and Conviction of the Attorney for Felony.

Commonwealth v. Fergurson.

Commonwealth v. Lomax.

There is also the Precedent of the Plaintiff in Error, removed by the arbitrary order of the Defendant, without any process on the files, or any Case on the Docket, at the October Term, A. D. 1864.

The *only* case to be found, in any Book of Reports at Common Law, containing *dicta*, or insinuating the doctrine, that an Attorney at law may be removed from his office without any written charges or process, is that of Randall, Petitioner for Mandamus, against the Justices of the Superior Court, in 11 Allen's Rep. 473.

See opinion of Bigelow, C. J., in that case.

XVII.

An action on the case may be maintained at common law for the disturbance of a party in the possession and enjoyment of an office, franchise or other incorporeal right.

McMahon v. Lennard. 6 House Lords Cases, 970.
Rogers v. Dutt. 13 Moore's P. C. 209.
Walker v. Lamb. Cro. Car. 258.
Ferrer v. Johnson. Cro. Eliz. 336.
Lee v. Drake. 2 Salk. 468.
Jones v. Pugh. 2 Salk. 465.
Sutherland v. Murray. Cited in 1 T. R. 538.
Hastings v. Prothonotary of Stepney Court. 1 Sid. 410.
Crowder v. Oldfield. 6 Mod. 19.
Strode v. Byrt. 4 Mod. 418.
Beau v. Bloom. 3 Wils. 456.
Carrington v. Taylor. 11 East, 511.
Thompson v. Gibson. 7 M. &. W. 456.
Peter v. Kendall. 6 B. & C. 703.
Townsend v. Blewitt. 5 How. Miss. 503.
Wammack v. Halloway. 2 Ala. 31.
Palmer v. Fisk. 2 Curtis C. Ct. 14.
People v. Turner. 1 Calif. 190.
Bruce v. Fox. 1 Dana, 450.
Glen v. Hodges. 9 Johns. 67.

"Though a case be of first impression, if it shows a concurrence of loss and injury, from the act complained of, the action will be maintainable."

Per Lord Campbell. Lynch v. Knight. 9 House Lords Cases, 577.

"If the proceedings are void against an Attorney, he would have an action for damages, if interrupted or deprived of the privileges and emoluments conferred by the license."

Hastings, C. J. The People v. Turner. 1 Calif. 190.

It is no objection to the maintenance of a suit simply because it involves a determination of a party's title to his office.

Allen v. McKeen. 1 Sumn. 317.
Avery v. Tyringham. 3 Mass. 160.
Hearsey v. Pruyn. 7 Johns. 179.
Arris v. Stukely. 2 Mod. 260.
Boyter v. Dodsworth. 6 T. R. 681.
Drew v. Fletcher. 1 Barn. & Cres. 283.
Capel v. Child. 2 Crompt. & Jerv. 558.
Wilde v. Russell. C. B. for Dec. 1866, p. 1728.
Lightly v. Clonston. 1 Taun. 113.

XVIII.

In an action against a judge of any Court, whether of Record or otherwise, for any act done by him or by his command, the question in every case to be determined is, *was the act done a judicial act, done within his jurisdiction?* If it was not, he can claim no immunity or exemption by virtue of his office, from liability as a trespasser; "for if he has acted without jurisdiction he has ceased to be a judge."

Houlden v. Smith. 14 Q. B. 841.
Calder v. Halket. 3 Moore's P. C. 28.
Taaffe v. Downes. 3 Moore's P. C. 36.
Gahan v. Lafitte. 3 Moore's P. C. 382.
Hill v. Bigge. 3 Moore's P. C. 465.
Miller v. Hope. 2 Shaw's App. Cases, H. L. 125.
Fergurson v. Kinnoull. 9 Clark & Fin. 296.
Dicas v. Brougham. 6 Car. & Payne, 249.
Kining v. Buchanan. 8 C. B. 271.
Watson v. Bodell. 14 M. & W. 70.
Beaurain v. Scott. 3 Camb. 388.
Ackerley v. Parkinson. 3 M. & S. 411.
Mitchell v. Foster. 4 Per. & Dav. 153.
Same Case. 12 A. & E. 472.
Garnett v. Ferrand. 9 Dowl. & Ryl. 670.

Gossett v. Howard. 10 Q. B. 411.
Van Sandau v. Turner. 6 Q. B. 773.
Johnstone v. Sutton. 1 T. R. 493.
Sutherland v. Murray. Cited in 1 T. R. 538.
Welsh v. Marsh. 8 East, 402.
Burdett v. Abbott. 14 East, 1.
Mostyn v. Fabrigas. 1 Cowp. 161.
Bushell's Case. 1 Mod. 119.
Hammond v. Howell. 2 Mod. 219.
Miller v. Seare. 2 Wm. Bl. 1141.
Smith v. Bouchier. 2 Stra. 993.
Groenveldt v. Burwell. 1 Ld. Raym. 454.
Martin v. Marshall. Hobart, 63.
Perkins v. Proctor. 2 Wils. 386.
Hoskins v. Mathews. 1 Lev. 292.
Floyd v. Barker. 12 Co. Rep. 23.
The Marshalsea Case. 10 Co. Rep. 76. A.
2 Inst. 427.
Piper v. Pearson. 2 Gray, 120.
Clark v. May. 2 Gray, 410.
Kelly v. Bemis. 4 Gray, 83.
Nixon v. Hill. 2 Allen, 215.
Wise v. Withers. 3 Cranch. 327.
Anderson v. Dunn. 6 Wheat. 204.
Kendall v. Stokes. 3 How. 789.
Mitchell v. Harmony. 13 How. 144.
Dynes v. Hoover. 20 How. 65.
Yates v. Lansing. 5 Johns. 282.
Bigelow v. Stearns. 19 Johns. 39.
Cunningham v. Bucklin. 8 Cowen, 178.
Horton v. Auchmoody. 7 Wend. 200.
Scovil v. Geddings. 7 Ohio, 566.
Greene v. Mumford. 5 R. I. 472.
Miller v. Grice. 2 Richardson, 27.
Lining v. Bentham. 2 Bay, 1.
Bevard v. Hoffman. 18 Md. 479.
Revill v. Pettit. 3 Met. Ky. 314.
Stat. of Marlbridge. 52 Hen. III. cited in 2 Co. Inst. 140

At Common Law, if a party claims any exemption from liability, for an act in itself wrongful, he must justify by plea, for the general issue puts the matter of the declaration alone in issue.

Coats v. Darby. 2 Comstock, 519.
Mostyn v. Fabrigas. 1 Cowp. 161.
McKenna v. Fisk. 1 How. 241.

11

Buck v. Colbath. 3 Wall. 345

XIX.

An instruction which has the effect to withdraw from the jury any matter of fact which is open on the evidence, is erroneous.

Jewell's Lessee v. Jewell. 1 How. 219.
Tolland v. Sprague. 12 Pet. 300.

XX.

"A prayer for instructions is equivalent to a demurrer to evidence, and should be tested by the same rules."

"A demurrer to evidence admits not only the facts stated therein, but also authorizes the drawing of any inferences from the facts whereby in any point of view the action can be sustained."

"On a demurrer to evidence, the Court is substituted in the place of the jury as judges of the facts, and everything which the jury might reasonably infer from the evidence, is to be considered as admitted; and Courts will be extremely liberal in their inferences where the party, by demurring takes the question of fact from the appropriate tribunal."

Schuchardt v. Allen. 1 Wall. 370.
Parks v. Ross. 11 How. 362.
Thornton v. The Bank of Washington. 3 Pet. 36.
Chinoweth v. Haskell's Lessee. 3 Pet. 92.
United States Bank v. Smith. 11 Wheat. 171.
Pawling v. The United States. 4 Cra. 219.
Young v. Black. 7 Cra. 565.
2 Tidd's Pract. Sec. 865, 3 Am. Ed. 1856, and note A.
Burge v. Coop. 5 Robertson's N.Y. Superior Ct. 11

On a demurrer to evidence, the Court have a discretionary power to assess the damages, if any facts exist whereby an estimate or computation may be made, without awarding a writ of Inquiry.

Renner v. Marshall. 1 Wheat. 215.
Pearson v. Duane. 4 Wall. 605.
Kelly v. Jackson. 6 Pet. 622.
Gahan v. Lafitte. 3 Moore's P. C. 382.
Cort v. Birkbeck. 1 Doug. 221.

Easton v. Smith. 1 E.D. Smith. 321.

The measure of damages in an action for disturbance, is the difference between what the party would probably have earned, had his rights not been interfered with or disturbed, and what he did earn, while they were so interfered with and disturbed, with an assessment for such other special damage as shall have been proved to have been sustained by reason of the wrongful act; which damages are to be computed so long as the disturbance is continued, up to the day of the bringing of the suit.

Rogers v. Dutt. 13 Moore's P. C. 209.
Thompson v. Gibson. 7 Mees & Wels. 456.
Kendrick v. Bartland. 2 Mod. 253.
Case of the Farmers of Hampstead Water. 12 Mod. 519.
Palmer v. Fisk. 2 Curtis, C. Ct. 14.
Shaw v. Cummiskey. 7 Pick. 76.
Puckell v. Smith. 5 Strobh. 26.
Beckwith v. Griswold. 29 Barb. 291.
Damron v. Roach. 4 Humph. 134.
Hilliard on Remedies for Torts. 419.

Flatt v. N.Y. Central R. R. Co.
New York Ct. of Appeals. January Term. 1868.
Reported in New York Tribune Sept 16. 1868,

Samuel H. Randall.
Pro Se.

Reports of the Cases

OF

SAMUEL H. RANDALL,

PETITIONER FOR CERTIORARI, AND PETITIONER FOR MANDAMUS,

vs.

THE JUSTICES OF THE SUPERIOR COURT,

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

COMMONWEALTH OF MASSACHUSETTS,

WITH

THE PETITIONER'S ORIGINAL BRIEFS

FILED IN THOSE CASES.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT.

SAMUEL H. RANDALL, Petitioner for *certiorari*.

PETITIONER'S BRIEF.

I.

No subject shall be held to answer for any crime or offence until the same is fully and plainly, substantially and formally described to him; and no subject shall be deprived of his immunities or privileges, but by the judgment of his peers or the law of the land.

Const. of Mass., Articles 12–29; Const. of U. S., Article 5, Amendments; Drowne *vs.* Stimpson, 2 Mass. 445; Fisher *vs.* McGirr, 1 Gray, 32–50; Comw. *vs.* Davis, 11 Pick. 436; Comw. *vs.* Philips, 16 Pick. 211; Comw. *vs.* Dean, 21 Pick. 334; Comw. *vs.* Keith, 8 Met. 531; Comw. *vs.* Blood, 4 Gray, 31.

II.

An attorney's office is in the nature of an immunity or privilege, and so long as an attorney remains of record, he shall have his privilege.

8 vol. Bouv. Bac. Abrdgmts. Privilege, B, p. 164; 1 vol. same, Abrdgmts. Attorney, G, pp. 474–505; Austin's case, 5 Rawle, 191.

III.

Attorneys being officers of Courts of Record, can only be complained of, held to answer, or removed by due process of law: which process may be, upon summary hearing upon petition, grounded on affidavit, motion for rule to show cause, grounded on affidavit, original bill or complaint, or by proceedings in the nature of an information under statute provisions wherever statute provisions exist, or by motion in writing, after an attorney has

been tried and convicted of any felony or gross misdemeanor. And the proceedings must in all cases contain the particular charge or specification of deceit, malpractice, misconduct or other offence relied upon. And, in general, where the attorney particularly denies the allegation, the court will dismiss the petition.

Gen. Stat. Mass. chap. 121, § 34; 2 Gr'lf. Evid. Attorney, § 147; Fisher's case, 6 Leigh, 619; Austin's case, 5 Rawle, 191; *Ex parte* Burr. 9 Wheat.; Anonymous, 2 Halst. 162; Bradley's case, 19 Mass. Law. Rep. 430; Backus *vs.* Rogers, 8 Johns, 346; Sabin *vs.* Wood, 10 Johns, 218; 1 McCord, 379; 2 McCord, 493; 4 Burr, 2060; 2 Wils, 37, 325, 371; 6 Term Rep. 701; 1 Bing, 102–142; 1 Chitty Rep. 186; 2 Chitty Rep. 63; Staple's case, April Term S. J. Court, 1863; Floyd's case, Nov. Term Superior Court, 1864; Way's case, Jan. Term Superior Court, 1862; Toomey's case, Oct. Term Superior Court, 1860; Tidd's Practice, 67; 3 Caines, 221; 4 Cowan, 76; 6 same, 512–596; Mordecai *vs.* Solomon, Sayres, 172; Russell's case, Sayres, 128; Rex *vs.* Bennett, Sayers, 169; Rex *vs.* Addington, Sayres, 259; 3 Brod & Bing, 257; 2 Black. Com. book iv. chap. 3.

IV.

The court will not interfere in a summary manner as to any writings or money received by an attorney, on any account, except it be received in his way of business as an attorney.

Salk. 87, pl. 5; 2 McCord, 493.

And where a contract has been fairly entered into, not forbidden by law between an attorney and his client, it will be supported.

1 McCord's Chanc. Rep. 526; Bill *vs.* Smith, 1 Dana, 582; 1 John's Chanc. Rep. 344; 8 Yerg, 484.

V.

The jurisdiction of courts is conferred and limited by law, and discretionary power is incident thereto. The court exercises its jurisdiction by virtue of original proceedings and process, legally and regularly before the court. And where it appears on the face of the proceedings the court had no jurisdiction, the proceedings are wholly void.

Brown *vs.* Webber, 6 Cush. 564; Piper *vs.* Pearson, 2 Gray, 123; Clark *vs.* May, 2 Gray, 410; Elder *vs.* Dwight & Co. 4 Gray, 204; Richardson *vs.* Welcome, 6 Cush. 333; Comw. *vs.* Albro, 1 Gray, 50; Arnold *vs.* Tourletot, 13 Pick. 172; 2 vol. Bouv. Abrdgmts. Courts, 360; 2 Black. Com. book iii. chap. 3; 2 same, book iii. chap. 18, 19; 1 vol. Bouv. Dict'y, Discretion, and cases cited; 2 vol. same, Jurisdiction, and cases cited; Mass. Gen. Stats. chap. 158, §§ 3–8; same, chap. 129, § 79.

VI.

It is necessary to the validity of acts of courts of inferior jurisdiction, that their records should show they have acted within the scope of their authority; and where the existence of a record be denied, it can be tried only by the record itself. And the report or opinion of a judge, and the papers and documents filed in the case, are no part of the record.

6 Co. Rep. 539; 9 Co. Rep. 31; 5 Cranch, 172, 185, 267; 10 Wheat. 199; 4 Mass. 122; 11 Mass. 513; 4 John, 292; 13 Pick. 172; 1 Gray, 50; 2 Gray, 123; 1 Inst. 117–260; 2 vol. Black. Com. book iii. chap. 3; Coolidge *vs.* Inglee, 13 Mass. 41; Read *vs.* Sutton, 2 Cush. 115; Moore *vs.* Lyman, 13 Gray, 396.

VII.

"In all decisions of a justice of the Supreme or Superior Court, in all cases civil or criminal, whether according to the course of the common law or otherwise, a party aggrieved by an opinion, ruling, direction or judgment of the court in matter of law, may allege exceptions thereto."

Gen. Stats. Mass. chap. 115, § 7.

And where a party is deprived of his remedy by exceptions, or the proceedings are defective, *certiorari* is the proper remedy.

Gen. Stats. chap. 115, § 3; same, chap. 145, § 8, 9; 16 Johns, 49; 8 Cush. 537; 2 Caines, 179; Co. Lit. 17–260; Salk. 200; Lev. 205; 4 Mass. 670; 4 Mass. 366; 11 Mass. 462; 2 Pick. 386; Lord Raym. 213, 252, 454; 2 Levintz, 99, 3; Howe's Mass. Pract. 491.

Transcript of the Report and Opinion of the Court, taken from 11 Allen's Mass. Reports, pp. 472, 473, in case of

SAMUEL H. RANDALL, Petitioner for *certiorari*.

"The doings of the Superior Court removing an attorney from practice cannot be revised or corrected, after judgment, by this court on a writ of *certiorari*.

Petition for a writ of *certiorari*, to quash the proceedings of the superior court in removing the petitioner from practice as an attorney at law. The petitioner set forth that no complaint or process in any form was filed against him, by reason of which omission the proceedings were illegal, and he accordingly at all times objected against them in the manner in which they appeared and were conducted before the court; and, for want of a legal record, he was deprived of his right to establish in this court his exceptions which were disallowed in that court. Notice of the pendency of the petition was served on the district attorney for the county of Suffolk, who appeared and answered orally; and the case was reserved by *Chapman*, J., for the determination of the whole court. This case was argued in March, 1865.

S. H. Randall, pro se.

H. F. French, assistant district attorney, *contra*.

BIGELOW, C. J. We have not paused to consider the subject matter of the petitioner's complaint, because we are clearly of opinion that, if he has any cause of grievance arising out of the proceedings of the superior court, his remedy therefor is not by *certiorari*; and it would not be in our power to afford him redress by issuing the writ for which he asks. The superior court is clothed with general jurisdiction, both civil and criminal, and in nearly all its doings it proceeds according to the course of the common law. Any person aggrieved by any order, direction or ruling of the court in matters of law, or by a judgment thereof in matters of law apparent on the record, can obtain a revision of its proceedings by exceptions or appeal. Gen. Sts. c. 114, § 10; c. 115, § 7. The authority of the court over its officers and the power to remove an attorney for misconduct or mal-

practice, although conferred in express terms by Gen. Sts. c. 121, § 34, are nevertheless incident to all common law courts of general jurisdiction, and the proceedings in such cases are to be deemed to be taken according to the course of the common law. The authorities are decisive that the doings of an inferior court in relation to such a subject matter cannot be revised or corrected, after judgment, by this court on a writ of *certiorari*. This subject was examined fully by this court in *Cooke, petitioner*, 15 Pick. 234, and it was there held that after final judgment in a court of record, proceeding according to the course of the common law, a *certiorari* ought not to issue, and that it is only where the court below is not a court of record or does not proceed according to the common law that a *certiorari* is a proper remedy to correct or revise the proceedings.

Petition dismissed."

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT.

SAMUEL H. RANDALL, PETITIONER FOR MANDAMUS,

vs.

JUSTICES OF THE SUPERIOR COURT.

PETITIONER'S BRIEF.

I.

No subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, in writing, described to him, and no subject shall be deprived of his immunities or privileges but by the judgment of his peers or the law of the land.

Art. 12, Dec'n of Rights, Const. of Mass.; Magna Charta, c. 29; Regina *vs.* Baines, Holt, 512–517; same case, 2 Lord Raym. 1265; 2 Salk. 681; Bagg's case, 6 Coke, 182; Rex *vs.* Univ'y of Cambridge, 1 Strange, 564; Rex *vs.* Robe, 2 Strange, 999; Rex *vs.* Richardson, 1 Burr, 525; Rex *vs.* Mayor of Liverpool, 2 Burr. 731; *Ex parte* Fisher, 6 Leigh, 619; Comw. *vs.* Davis, 11 Pick. 434; Comw. *vs.* Phillips, 16 Pick. 213; Comw. *vs.* Dean, 21 Pick. 334; Comw. *vs.* Blood, 4 Gray, 32; Article V. Amendments U. S. Constitution; Austin's case, 5 Rawle, 191.

II.

Where a court has jurisdiction of the subject matter of any complaint or other proceeding of record before it, some form of legal process must issue by the court, notifying a party of the charge filed against him, in order to give the court jurisdiction over the person of respondent; and where a court proceeds without having jurisdiction, both of the subject and the person, its action is wholly void. And no consent of parties will give a court jurisdiction where it is not conferred by law.

Brown *vs.* Webber, 6 Cush. 564; Richardson *vs.* Welcome, 6 Cush. 333; Gen. Stats. chap. 159, § 8; Comw. *vs.* Keith, 8 Met. 532; Piper *vs.* Pearson, 2 Gray, 120; Herrick *vs.* Smith, 1 Gray, 50; Chase *vs.* Hathaway, 14 Mass. 222; Hall *vs.* Williams, 6 Pick. 247; McCall *vs.* Peachy, 1 Call, 48; 2 Gray, 129,

III.

There could be no legal cause on the merits for petitioner's removal from his office of attorney, where there was no act of any malpractice or misconduct complained of by any private or public prosecutor against him, and no legal summons whatever to appear by the court; and the judgment and order of petitioner's removal by the Superior Court, which was a conclusion without legal premises, was an usurpation against law, whereby the whole proceeding was illegal and void, *ab initio*.

Piper *vs.* Pearson, 2 Gray, 123; Comw. *vs.* Keith, 8 Met. 532; Regina *vs.* Baines, 2 Lord Ray, 1273; Rex *vs.* Richardson, 1 Burr, 536.

IV.

It is necessary to the validity of acts of courts of inferior jurisdiction, that their records should show they have acted within the scope of their authority; and where the existence of a record be denied, it can be tried only by the record itself, and the report or opinion of a judge, and the papers and documents filed in the case are no part of the record.

Coolidge *vs.* Inglee, 13 Mass. 41; 2 Bouv. edit. Bac. Abridgements, 630, and cases cited; Arnold *vs*, Tourtellot, 13 Pick. 172; 2 vol. Black. Com. book iii. chap. 3; Sayles *vs.* Briggs, 4 Met. 423.

V.

The Supreme Court has ample power to issue all prerogative writs for the furtherance of justice and securing order and regularity in all the tribunals where there is no other regular and ordinary remedy. And Mandamus is the proper process for restoring a person to an office from which he has been unjustly removed, or to admit any one to an office, a service, or a franchise from which he is unlawfully excluded.

Washburn *vs.* Phillips, 2 Met. 298; Gen. Stats. c. 112, § 3; Strong, pet'r, 20 Pick. 495; Wellington, pet'r, 16 Pick. 105; People *vs.* Justices, etc. 1 Johnson's cases, 181; *Ex parte* Burr, 9 Wheaton.

VI.

"The return to a Mandamus should set out all necessary facts precisely, to show the person removed in a legal and proper manner, and for a legal cause. It is not sufficient to set out *conclusions* only, the facts must be precisely set out, that the court may judge of the matter. So it is the same as to the *cause* of the amotion, that must likewise be set out."

Pr. Lord Mansfield, C. J., Rex *vs.* Mayor of Liverpool, 2 Burr. 731; Rex *vs.* Mayor of Abingdon, 2 Lord Raym. 1564; 2 Salk. 432; 1 Strange, 557; Rex *vs.* Feversham, 8 T. R. 356; 12 Mod. 113; Tapping, § 352.

VII.

If a return be made to the writ, which upon the face of it is insufficient, the court will grant a peremptory Mandamus.

Selw. N. P. 1095; 5 T. R. 76; 12 Mod. 113; Tapping § 358.

Transcript of the Report and Opinion of the Court, taken from 11 Allen's Mass. Reports, pp. 473–482, in case of

SAMUEL H. RANDALL, Petitioner for *mandamus*.

"This court will not issue a writ of *mandamus* directing the superior court to restore an attorney at law whom they have removed from practice, although such removal was made without any previous written charge of misconduct against him, and without any summons or other process to bring him before the court; especially if it appears that in fact he had notice of proceedings in that court, and appeared therein, and had ample time allowed to him, and a full hearing on the merits, and that, on the facts found by the court, the removal was proper, and that after alleging exceptions to the judgment of removal, which were disallowed by that court on the ground that the subject matter was not open to exception, he omitted to prosecute them in this court, by proving them under Gen. Sts. c. 115, § 11.

PETITION for a writ of *mandamus*. The petitioner set forth in his petition that in 1860 he was duly admitted to practise as an attorney, and by virtue thereof as a counsellor at law, in all the courts of the Commonwealth; that his name is still upon the records; that he has never resigned his said office, and knows of no legal cause why he should not be permitted fully to enjoy all the rights and privileges of the same; and that denial of his right to practise as an attorney is now made by the justices of the superior court. The prayer was for a writ of *mandamus* commanding the justices of that court to admit the petitioner to the practice of his office of attorney therein, or to show cause why he should be excluded therefrom.

An alternative writ was accordingly issued and served; and the chief justice of the superior court accordingly, in answer

thereto, transmitted to this court a copy of the record of the proceedings of that court, at the October term thereof for criminal business in Boston in 1864, so far as the same disclosed any proceedings having any relation to the petitioner. This record set forth that, "in the matter of Samuel H. Randall, an attorney at law, against whom charges of professional misconduct and malpractice have been made before this court, after a full hearing the following facts have been found." A detailed statement of facts then followed, respecting the petitioner's dealings with Michael Leighton, a client who had been committed to jail for failing to recognize to answer to a charge of larceny; for whom the petitioner then became a surety; and who thereupon enlisted as a substitute in the naval service of the United States, under a contract with the petitioner as to the disposition to be made of the money to be paid for the enlistment. The record then stated that an indictment against Leighton was presented in the superior court on September 12th, 1864, "and on the 16th of September he was called to plead to said indictment; and the attention of the court was directed to the foregoing facts by the grand jury, and said Randall notified that upon the following Wednesday, September 21, the matter of his professional conduct and standing at the bar would be considered." A hearing accordingly took place on September 21st, at which the petitioner appeared, offered evidence, and was heard. The record concluded thus: "Upon the foregoing facts, the court find that said Samuel H. Randall, in the making of said contract, in his acts in pursuance of it, and in his relation to said Leighton as his client, and affecting his interests, violated his oath of office as an attorney at law, and was guilty of malpractice and gross misconduct in his said office; and the judgment and order of the court is, that for these causes he be removed from the office of an attorney at law within this commonwealth. Lincoln F. Brigham, Justice of Superior Court."

The petitioner demurred to the above return, as an answer to the alternative writ, and assigned the following reasons:

"1. That it nowhere appears in said return there was any charge, specific or general, of any act of malpractice and gross

misconduct by the petitioner, contained or referred to in any petition, complaint or other proceeding, filed of record in said superior court against the petitioner, as an attorney at law, as is required by law and the practice and usage of said superior court in proceedings for the removal of attorneys.

"2. That said return does not disclose the fact that said superior court had any lawful jurisdiction over the person of the petitioner as an attorney at law by the service and return of record of any summons, order of notice, or other process of said court, notifying the petitioner to appear before said court, at a day certain, to answer charges that had been preferred against him.

"3. That no legal cause, on the merits, is disclosed by said return, warranting the petitioner's removal from his office of attorney.

"4. That said return contains no legal record of the petitioner's removal from his office of attorney at law.

"5. That said return is so general, uncertain and indefinite, as to be invalid in law, as a sufficient return to the writ of *mandamus*."

The case was thereupon reserved by the chief justice for the determination of the whole court.

H. W. Paine, for the petitioner. The writ of *mandamus* is the remedy almost uniformly resorted to, to restore an attorney; 6 Bac. Ab. Mandamus, C; People *vs.* Justices of Delaware Common Pleas, 1 Johns. Cas. 181; and this, not only where the inferior court which passed an order of removal had not jurisdiction, but also where it had jurisdiction, and it it is sought to revise its conclusion upon the facts and its judgment upon the law. In the present case there was no petition filed, or information, or preliminary proceeding. For aught that appears, information such as Mr. Justice Brigham thought he could rely on was communicated to him, the petitioner was sent for, a hearing was had, and a conclusion arrived at, no charges being filed. The return to an alternative writ of *mandamus* must set out all the facts relied on. Rex *vs.* Mayor, &c. of Liverpool, 2 Burr. 731. It is familiar, that before one is tried for an offence there must be a specification in writing. Declaration of Rights, art. 12, pt. 1.

This is but a re-affirmance of a common law principle, and in every case where a man is charged with a crime or offence it must first be described to him. In all the reported cases brought to my attention, where a petition has been made for the removal of any attorney, there has been in some form a specification of charges.

The petitioner also filed a brief. Where a court has jurisdiction of the subject matter of any complaint or other proceeding, some form of legal process must issue, notifying a party of the charge filed against him, in order to give the court jurisdiction over the person of the respondent. And where a court proceeds without having jurisdiction both of the subject and the person, its action is wholly void. Brown *vs.* Webber, 6 Cush. 560. Richardson *vs.* Welcome, Ib. 333. Piper *vs.* Pearson, 2 Gray, 120. Herrick *vs.* Smith, 1 Gray, 50. There could be no legal cause on the merits for the petitioner's removal from his office of attorney, where there was no act of any malpractice or misconduct complained of by any private or public prosecutor against him, and no legal summons whatever to appear; and the order of removal, which was a conclusion without legal premises, was an usurpation against law, whereby the whole proceeding was illegal and void *ab initio*. Piper *vs.* Pearson, 2 Gray, 120. Commonwealth *vs.* Keith, 8 Met. 531. Regina *vs.* Baines, 2 Ld. Raym. 1273. Rex *vs.* Richardson, 1 Burr. 536.

No counsel appeared to oppose the petition.*

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* Mr. French, in the preceding case, submitted the following argument on points involved in this case: 1. The judgment of removal is not a punishment or in the nature of a punishment for a crime or offence, and therefore the proceedings are not necessarily in the form of a charge for a criminal offence. Attorneys have been removed on conviction of crime; yet the removal has not been deemed in the nature of a punishment, but to have been made because a due regard to the dignity and decency of the court does not permit such fellowship. *Ex parte* Brounshall, Cowp. 829. The statute also provides that an attorney may not only be removed, but may be liable civilly and criminally. Gen. Sts. c. 121, § 34. Such removal is analogous to a divorce for crime. Ferguson was recently convicted of larceny, and removed from the bar on motion, with no allegation against him or hearing whatever.

This is not a case civil or criminal, within the meaning of the statute allowing exceptions. Gen. Sts. c. 115, § 7. It is a matter in which that court had final jurisdiction.

2. The power to remove an attorney for misconduct is incident to every court, and such removal is in the nature of a punishment for contempt. If the proceedings are sufficient for the punishment of a contempt, they are sufficient for this

BIGELOW, C. J. An alternative writ of *mandamus* having issued in this case, and a return thereto having been made by the chief justice of the superior court, setting forth that he transmits "a copy of the record of the proceedings of said superior court having any relation to the said petitioner," the question now arises whether this court are bound to issue a peremptory writ, commanding the superior court to admit the petitioner to the practice of his office of attorney in that court. By the record before us it appears that, at the October term of the superior court held at Boston in the year 1864 for the transaction of criminal business, it was found by that court that "Samuel H. Randall violated his oath of office as an attorney at law, and was guilty of malpractice and gross misconduct in his said office; and the judgment and order of the court is, that for these causes he be removed from the office of an attorney at law within this commonwealth." This adjudication is preceded by a statement signed by the presiding judge, setting forth in detail the facts on which his conclusions and judgment were based. These the petitioner does not seek to traverse or deny. By demurring to the return he must be deemed to admit all that is therein set forth, and to put his case on the single issue that, taking the record as it stands, it furnishes no warrant in law for the judgment of removal from his office, pronounced by the court below; that such removal was wrongful and erroneous; and that it is the duty of this court to reinstate the petitioner therein.

Upon careful and deliberate consideration of the case thus presented, the court are unanimously of opinion that the petitioner fails to show any sufficient ground for the relief which he seeks. In the first place, it is too clear to admit of debate that, in a proceeding of this nature, the doings of inferior courts cannot be revised or corrected in matters which are within their jurisdiction, and in regard to which they are authorized to exer-

purpose. See Heard *vs.* Pierce, 8 Cush. 338; Tenney's case, 3 Fost. (N. H.) 166; State *vs.* Matthews, 37 N. H. 450; Bryant's case, 4 Fost. (N. H.) 149; 18 Law Reporter, 421, *& seq.*; *Ex parte* Chetwynd, Re Mulock, 4 Amer. Law Reg. (N. S.) 298. The Gen. Sts. c. 121, § 34, simply declare the common law as to the power to remove attorneys.

cise a judicial discretion, and to render a judgment according to the conclusions of fact and law at which they may arrive. If a party is aggrieved by the action of a judicial tribunal in relation to such matters, he must seek redress in other modes than by writ of *mandamus*. Gray *vs.* Bridge, 11 Pick. 188. Rea *vs.* Commissioners of Middlesex, 13 Pick. 225. Strong, petitioner, 20 Pick. 484, 497. This doctrine is not seriously controverted by the petitioner. He does not place his main demand for relief on the ground that the conclusion and judgment of the court below were erroneous as to matters of fact, or that the judgment of removal pronounced against him can be inquired into and revised here so far as it involves only an investigation of the merits of the case on which his removal was founded.

We are, then, in the next place, to consider whether he is entitled to relief on the other ground set up by him, namely, that the whole proceedings were unauthorized by law and invalid, because there was no rule, complaint or attachment made or issued, setting forth any act of misconduct or malpractice by him, and no summons or other process was ever procured, sent out or served to bring him before the court. For this reason he contends that the judgment and order of the superior court for his removal constituted a conclusion without legal premises, a usurpation against law, whereby the whole proceeding was illegal and void *ab initio*. The argument urged in support of this position is put on the ground that by this course of proceedings the constitutional rights of the petitioner were invaded, and that he was held to answer in violation of the 12th article of the Declaration of Rights of the Constitution of Massachusetts, there having been no full, plain, substantial and formal description of any offence made or filed against him, and that he has been thus deprived of his rights and privileges as an attorney contrary to the law of the land.

There would be great force in this argument, if it were clear that the proceedings for the removal of the petitioner were of a nature to come within the class of cases to which the provision of the Declaration of Rights on which the petitioner relies is

applicable. But we do not think that it can in any just and proper sense be deemed a criminal procedure in which a party has a right to insist on a full, formal and substantial description of the matter with which he is charged, or that it is essential to the validity of the order or judgment of the court that it should be founded on legal process according to the signification of the words "*per legem terræ*," as used in Magna Charta and in the Declaration of Rights, that is, on complaint or indictment, followed by a trial in a regular course of legal and judicial proceedings. 2 Inst. 50. Fisher *vs.* McGirr, 1 Gray, 37. On the contrary, at common law an attorney was always liable to be dealt with in a summary way for any ill practice attended with fraud or corruption, and committed against the obvious rules of justice and honesty. No complaint, indictment or information was ever necessary as the foundation of such proceedings. Usually they are commenced by rule to show cause, or by an attachment or summons to answer; but these are issued on motion or bare suggestion to the court, or even on the knowledge which the court may acquire of the doings of an attorney by their own observation. No formal or technical description of the act complained of is deemed requisite to the validity of such a proceeding. Sometimes they are founded on affidavit of the facts, to which the attorney is summoned to answer; in other cases, by an order to show cause why he should not be stricken from the roll; and when the court judicially know of the misconduct of an attorney, they will of their own motion order an inquiry to be made by a master without issuing any process whatever, and on the coming in of his report will cause his name to be stricken from the roll. Bac. Ab. Attachment, A, Attorney, H, and cases cited. The King *vs.* Southerton, 6 East, 143. In the matter of Elsam, 3 B. & C. 597; S. C. 5 D. & Ry. 389.

Nor can a judgment of removal be properly and technically considered as a punishment for a crime or offence. In *Ex parte* Brownshall, Cowp. 829, Lord Mansfield said, "To strike an attorney from the roll" is not in the nature of a punishment; it is done "because he is an unfit person to practise as an attor-

ney; the court exercise their discretion whether a man, whom they formerly admitted to the bar, is a proper person to be continued on the roll."

Such would seem to be the character of the proceedings under our statute, Gen. Sts. c. 121, § 34, which provide that removal from the bar shall not exempt an attorney from any other punishment which may be provided by law for his acts of malpractice and misconduct. If removal from the bar is to be regarded as a punishment for an offence, then it would follow that a person might be liable to two criminal prosecutions, be subject to two separate judgments, and be made to suffer two distinct punishments, for one and the same act or offence. We cannot think that the legislature contemplated any such result. The more reasonable inference is that the power of removal was given, not as a mode of inflicting a punishment for an offence, but in order to enable the courts to prevent the scandal and reproach which would be occasioned to the administration of the law, by the continuance in office of those who had violated their oaths or abused their trust, and to take away from such persons the power and opportunity of injuring others by further acts of misconduct and malpractice. Upon these grounds, we are of opinion that the petitioner fails to support the position on which he relies as the foundation for his claim to relief in this proceeding.

But there is another view of this case which seems to furnish decisive reasons for a refusal to issue a writ of *mandamus* to require the court below to restore the petitioner to his standing as an attorney. The proceedings as certified to us show that the petitioner appeared before that court to answer to the charges of misconduct and malpractice which had been brought to the attention of that tribunal by the grand jury in attendance thereon; that although there were no formal written charges preferred against him, he fully understood their nature and character, and was allowed ample time and opportunity to be heard thereon, and that he had a full hearing on the merits. The record now before us does not show that he raised the objection, on which he now insists, that he was not duly brought before the court by legal process, and that there was no proper allegation in writing

of the misconduct imputed to him. But on recurring to the documents appended to the petition for a *certiorari* presented to this court at a former term, we find that such objection was made and overruled, and that the petitioner presented exceptions, setting forth the rulings on this point, which were not allowed by the court. These exceptions the petitioner did not attempt to prosecute by proving the same according to the provisions of Gen. Sts. c. 115, § 11. He thereby in effect abandoned them. It is not alleged in the petition for a *mandamus*, nor does the petitioner now aver, that he did not in fact fully comprehend the subject matter of the charges of misconduct made against him, or that he did not have a full hearing thereon; nor does he contend that the finding of the court in relation to the facts was not warranted by the evidence adduced at the hearing. Such being the state of the case, we are of opinion that the petitioner must be deemed to have waived any right to ask us to interfere by a writ of *mandamus* in his behalf, on the ground that there has been a technical ommission to issue an attachment against him, or summons to appear, or a rule to show cause. Undoubtedly it would have been regular and proper to issue such process. But it was not essential, and the omission to issue it has worked no harm to the petitioner. Certainly he has alleged none, nor has he offered to show any. For aught that we see in the record, the finding of the court as to matters of fact was correct, and the judgment of removal well warranted by the evidence adduced at the hearing. If, therefore, we issued a writ of *mandamus* on the ground alleged by the petitioner that there was no proper process, the result would be that we should restore a person to his office who was unfit to hold it, and who might be removed therefrom immediately on due proceedings had. But a writ of *mandamus* is not a writ of right. It is within the discretion of the court whether it ought to be issued in each case that arises for adjudication. Strong, petitioner, 20 Pick. 497. The King *vs.* Commissioners of Excise, 2 T. R. 385. It seems to us that we should be wanting in a sound judicial discretion, if, on the case presented by the petitioner, we interfered by a writ of *mandamus* in his behalf.

Peremptory mandamus denied."